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No.

In The
Supreme Court of the United States
October Term, 1994

PATRICIA E. McKENNA,
Petitioner,
vs.
DISTRICT COURT of the SECOND JUDICIAL DISTRICT,
Respondent.

Petition For Writ Of Certiorari
To The New Mexico Supreme Court

PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether the guarantee of a republican form of state government in Article 4, Section 4 of the Constitution of the United States, or the Substantive Due Process Clause of its Fourteenth Amendment, bars the New Mexico Supreme Court from blocking grand jury investigation of alleged government corruption, involving judicial officers, by that court's use of indirect re-interpretation of the state's Constitution, contrary to other fundamental laws of the state, to deprive a substantive right, protected by the Ninth and Tenth Amendments and the Right to Petition Clause of the First Amendment to the Constitution of the United States, of its intended effect as circumscribed by the plain meaning of a clear and unambiguous provision of the state Bill of Rights, a self-executing provision of the state constitution, that vests in any 200 voters of any county the power, by their petition, to compel a judge to order that a grand jury be empaneled.

II. Whether the guarantee of a republican form of state government in Article 4, Section 4 of the Constitution of the United States, or the Substantive Due Process Clause of its Fourteenth Amendment, bars the New Mexico Supreme Court from using its authority to adopt rules of pleading, practice and procedure to re-define the common law concept of a grand jury's functions to eliminate the broad investigating powers, thus depriving citizens of the intended effect of a substantive right reserved in a self-executing provision of the state constitution and protected under the Ninth and Tenth Amendments and the Right to Petition Clause of the First Amendment to the Constitution of the United States.

III. Whether extension of judicial powers to establish procedural rules and guidelines conditioning the

empaneling of grand juries, pursuant to voters' petitions certified in accordance with a provision of the state Bill of Rights, upon judge's discretionary determination that the substance of the allegations in the petition reach an arbitrary threshold of judicially created guidelines violates the due process provision of the Fourteenth Amendment to the Constitution of the United States by subjecting to judicial discretion the realization of an exercise of direct political power reserved to the people in their state Constitution and protected as a reserved right under the Ninth and Tenth Amendments and the Right to Petition Clause of the First Amendment to the Constitution of the United States.

IV. Whether the procedural regimen that the challenged opinion imposes on voters' petitions for grand jury violates the due process provision of the Fourteenth Amendment to the Constitution of the United States by chilling the exercise of a right to petition secured by the First Amendment to the Constitution of the United States and by depriving the petitioning voters, potential complainant witnesses and the public of the benefits, as a means to suppress corruption and malfeasance in government, of the investigating grand jury's political independence, speed, secrecy and broad latitude of inquiry, which the framers of the New Mexico Constitution sought to secure, through its incorporation in Article II, Section 14, a self-executing provision of the state Bill of Rights establishing the right of voters to petition for grand jury, against abridgement or deprivation by actions of public officials in any branch of state government.

V. Whether the petitioner for grand jury was denied due process of law and equal protection of laws in violation of the Fourteenth Amendment to the Constitution of the United States by the court's application of its new procedural regimen to invalidate her certified, filed and

pending petition for grand jury.

VI. Whether the petitioner for grand jury was deprived of her First Amendment right to petition without due process of law in violation of the Fourteenth Amendment to the Constitution of the United states by being denied notice and a meaningful hearing before an impartial tribunal prior to the court's denial of her petition for grand jury under the provisions of a procedural rule adopted by the opinion in the case after she briefed on validity and sufficiency of her petition for grand jury at the state Supreme Court's instruction in a proceeding on consideration of a petition for writ of superintending control prior to the state Supreme Court's grant of a writ of superintending control to assume jurisdiction of the grand jury matter.

VII. Whether the judgement of the state Supreme Court is absolutely void, depriving Petitioner of rights secured by the First, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States and Article Four, Section Four thereof without due process of law, in violation of the Due Process Clause of the Fourteenth Amendments to the Constitution of the United States because the state Court lacked jurisdiction in the proceeding on the Petition for Writ of Superintending Control to hear or determine any issue of rights of the petitioner for grand jury for want of subject matter jurisdiction under the fundamental law creating the New Mexico Supreme Court and vesting its lawful powers and want of jurisdiction of a justiciable controversy brought properly before the court by a party having standing to sue against a party amenable to the type of action for relief that was within the power of the court to grant.

VIII. Whether the Petition for Writ of Superintending Control filed by the District Court of the Second Judicial

District, naming a private citizen, Patricia E. McKenna, as respondent for having filed a petition for grand jury, is frivolous, constitutes champtery and was interposed in bad faith for purposes of delaying the process of justice to deprive the citizen and the public of the benefit of the right asserted, to gain unfair advantage by a suit attacking the substance of the New Mexico Constitution with officious intimidation of Petitioner herein and members of the Bar who might otherwise have represented Petitioner's interests in the lower court, and constitutes a strategic lawsuit against public participation prosecuted with a purpose to chill future exercise of rights protected by the Right to Petition Clause of the First Amendment of the Constitution of the United States, and sanctions therefore should be imposed pursuant to this Court's inherent powers to impose sanctions or under the applicable state rule, SCRA 1986 Rule 1 011, for false pleading in bad faith.

IX. Whether a judge of competent jurisdiction must order that a grand jury be empaneled and charged pursuant to the instant voters' petition or that the matter of inquiry therein be ordered assigned to a seated panel, said petition having been certified by the county clerk to bear the signatures of more than two hundred registered voters of the county.

X. Whether state's highest court, by committing multiple, flagrant errors to deny a party procedural due process and fundamental fairness in a proceeding under original jurisdiction, thereby can avoid examination of more weighty constitutional questions central to the issues in the state court's opinion upon review of that opinion in the United States Supreme Court, in violation of the Right to Petition Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

XI. Whether N.M.S.A. 1978 31-6-9 (1993 Repl.) is unconstitutional as construed and applied as authorizing the New Mexico Supreme Court or the District Court of the Second Judicial District, Bernalillo County, to refuse to empanel a grand jury pursuant to a petition to investigate allegations of criminal conduct or malfeasance against judicial officers and other public officials and private persons, said petition having been filed in said District Court and certified by the Bernalillo County Clerk as bearing signatures of 264 registered voters of the County, such construction being violative of the First, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States and Article Four, Section Four of the same, in that it permits the state Legislature to subject to judicial authority the petitioners' and public's realization of the intended effect of an autonomous exercise of political authority, the act of two hundred or more voters to compel a grand jury investigation, delegated in a self-executing provision of the Bill of Rights of the New Mexico Constitution, Article Two, Section Fourteen.

XII. Whether alleged violations of federal criminal statutes constitute public offenses in the context of the investigating powers of common law grand juries such that the actions of state government officials that seek to prevent a grand jury, empaneled pursuant to a state constitutional mandate, from inquiring into such allegations and presenting an information to the appropriate federal authorities based upon the results of the inquiry, violate the First, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States and Article Four, Section Four of the same.

XIII. Whether the New Mexico Supreme Court's refusal to order a grand jury empaneled pursuant to voters' petition in the instant case, seeking investigation, inter alia, of judges and other judicial officers, while approving

another petition six days later, the difference being a matter of judicial discretion as to the sufficiency of the content in violation of the intent of the framers of the state Constitution as interpreted by the same Court, but alleged by the Court to be a nondiscretionary determination, violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

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REPORTS OF THE OPINION

The opinion of the New Mexico Supreme Court in original jurisdiction is reported as 881 P.2d 1387 (N.M. 1994) and in Advance Opinions, 33 N.M.S.B.B. 1418 (No. 50 Dec. 15, 1994). There were no decisions in inferior courts on the merits of the case.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) by petition for certiorari to review an opinion rendered September 24, 1994 by the New Mexico Supreme Court in original jurisdiction on grounds that the opinion is in conflict with opinions of the United States Supreme Court on federal questions and was decided opposite to an opinion of the Oklahoma Supreme Court on the same federal question and under 28 U.S.C. 1273(2) on ground that a state statute, N.M.S.A. 1978 32-6-9 (1993 Repl.), as that statute is construed and applied, is repugnant to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS
UNITED STATES CONSTITUTION
ARTICLE IV.

Section IV. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

UNITED STATES CONSTITUTION
BILL OF RIGHTS
FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

NINTH AMENDMENT

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

TENTH AMENDMENT

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

FOURTEENTH AMENDMENT

Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF NEW MEXICO
ARTICLE II. BILL OF RIGHTS

Sec. 14. Grand jury; information and indictment; rights of accused

. . . A grand jury shall be composed of such number, not less than twelve, as may be prescribed by law. Citizens only, residing in the county for which a grand jury may be convened and qualified as prescribed by law, may serve on a grand jury. Concurrence necessary for the finding of an indictment by a grand jury shall be prescribed by law; provided, such concurrence shall never be by less than a majority of those who compose a grand jury, and, provided, at least eight must concur in finding an indictment when a grand jury is composed of twelve in number. Until otherwise prescribed by law a grand jury shall be composed of twelve in number of which eight must concur in finding an indictment. A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital, felonious or infamous crimes at such times as to him shall be deemed necessary, or a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than the lesser of two hundred registered voters or five percent of the registered voters of the county, or a grand jury may be convened in any additional manner as may be prescribed by law. . . .

N.M. Const., Art. II, Sec. 14

ARTICLE IV. LEGISLATIVE DEPARTMENT

Sec. 34. Pending cases

No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.

N.M. Const., Art. IV, Sec. 34

ARTICLE VI. JUDICIAL DEPARTMENT

Sec. 2. Appellate jurisdiction

Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court. In all other cases, criminal and civil, the supreme court shall exercise appellate jurisdiction as may be provided by law; provided that an aggrieved party shall have an absolute right to one appeal.

N.M. Const., Art. VI, Sec. 2

Sec. 3. Supreme court; original jurisdiction

The supreme court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions, and shall have a superintending control over all inferior courts; it shall also have power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction and other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same. Such writs may be issued by direction of the court, or by any justice thereof. Each justice shall have power to issue writs of habeas corpus upon petition by or on behalf of a person held in actual custody, and to make such writs returnable before himself or before the supreme court, or before any of the district courts or any judge thereof.

N.M. Const., Art. VI, Sec. 3

SCRA 12-504 Extraordinary writs (1994 Supp.)

12-504. Extraordinary writs.

A. Scope of rule. This rule governs the procedure for the issuance of all writs in the exercise of the supreme court's original jurisdiction except for writs of certiorari to the court of appeals pursuant to Rule 12-502 and the district courts pursuant to Rule 12-501 and writs of error.

B. Initiation of proceedings.

(1) Extraordinary writ proceedings in the exercise of the supreme court's original jurisdiction shall be initiated by filing with the supreme court clerk a verified petition of the party seeking the writ along with the appropriate docket fee or free process order. As used in this rule, a "verified petition" is one which contains a statement under oath that the signer has read the petition and that the statements contained in the petition are true and correct to the best of the signer's knowledge, information and belief. The petition shall set forth the following:

(a) the grounds on which jurisdiction of the supreme court is based;

(b) the circumstances making it necessary or proper to seek the writ in the supreme court if the petition might lawfully have been made to some other court in the first instance;

(c) the name or names of the real parties in interest, if any, if the respondent is a justice, judge, or other public officer or employee, court, board or tribunal, purporting to act in the discharge of official duties;

(d) the ground or grounds upon which the petition is based, and the facts and law supporting the same stated in concise form; and

(e) a concise statement of the relief sought.

(2) The petition shall have attached as exhibits:

(a) any opinions, orders, transcripts or other written materials indicating the respondent's position on

the matter in question, if available; and

(b) the proposed form of writ.

C. Hearing and disposition.

(1) If it appears to a majority of the court that the petition is without merit, concerns a matter more properly reviewable by appeal, or seeks relief prematurely, it may be denied without a hearing.

(2) Except as provided in Subparagraph (1) of this paragraph, the petition shall be set for an initial hearing no sooner than seven (7) days after it is filed. The supreme court clerk shall give at least five (5) days notice of the hearing to respondent, petitioner, the real parties in interest and the attorney general by telephone and by mail. The respondent, real parties in interest and the attorney general may, but are not required to, file a response and attend and participate in the initial hearing.

(3) At the initial hearing, the court may:

(a) deny the petition;

(b) issue an alternative writ to the respondent and set a subsequent date for a final hearing;

(c) issue a peremptory writ to the respondent, if the respondent and the real parties in interest received notice and participated in the initial hearing and if it appears to the court that the petition has merit and no further hearing is necessary; or

(d) take any other action which it deems to be appropriate under the circumstances.

(4) If the court sets the petition for a final hearing, the following procedure applies, unless the court orders otherwise:

(a) petitioner shall file and serve a brief within ten (10) days after the issuance of the writ;

(b) respondent, the real parties in interest and the attorney general may file an answer brief within ten (10) days after service of the petitioner's brief;

(c) the final hearing shall be held within ten (10) days after the time for filing briefs has expired;

(d) the petitioner, the respondent, the real parties in interest and the attorney general shall be allowed to fully participate in the final hearing; and

(e) upon the final hearing, the court may order that the alternative writ previously issued either be quashed or be made permanent.

(5) If the petitioner is entitled to a writ or relief other than that requested in the petition, the petition shall not be denied but the court shall grant the writ or relief to which the petitioner is entitled.

D. Stays.

(1) A party filing a petition for an extraordinary writ and also seeking a stay of some action by the respondent pending the initial hearing shall include the phrase "and Request for Stay" in the title of the petition in addition to complying with other requirements of this paragraph. (For example, "Petition for Writ of Prohibition and Request for Stay".)

(2) The court may issue a stay to the respondent without notice to the respondent or the real parties in interest only if:

(a) it clearly appears from the verified petition or by affidavit filed with the court that immediate and irreparable injury, loss or damage will result to the petitioner before the respondent or real parties in interest could be heard in opposition;

(b) it clearly appears from the verified petition or by affidavit filed with the court that no loss or damage will result to the respondent or any real parties in interest, or, if loss or damage will occur, what that loss or damage will be; and

(c) counsel for petitioner certifies in writing to the court the efforts, if any, which have been made to give notice and the reasons supporting the petitioner's claim that notice should not be required.

(3) If the respondent or real parties in interest receive j notice of a request for stay, any or all of them

may file a response to the request before the court acts on the request. The court may act on a request for stay prior to the filing of a response.

(4) If a request for stay is granted pursuant to this rule, the respondent or any real parties in interest may move to have the stay vacated and the court may act thereon with or without notice as deemed appropriate. If it is vacated, the court may, in its discretion, either hear the petition at the initial hearing or deny the petition without a hearing and, in either event, may assess costs and attorneys fees as deemed appropriate in connection with the request for stay.

(5) If the request for stay is denied, the petition shall be set for an initial hearing unless the court decides to deny the petition without a hearing.

E. Service.

(1) Petitioner shall cause any order granting or vacating a stay, any alternative writ, any order either quashing an alternative writ or making it permanent and any peremptory writ to be served on the respondent as soon as possible after it is issued by the court and shall serve it upon the real parties in interest and the attorney general in accordance with Subparagraph (2) of this paragraph.

(2) Service of all papers filed under the rule shall be made pursuant to Rule 12-307 upon petitioner, respondent, any real parties in interest and, if the respondent is as described in Subparagraph (c) of Subparagraph (1) of Paragraph B of this rule, the attorney general.

[As amended, effective January 1, 1988; September 1, 1991; September 1, 1993.]

Sec. 38-1-1. Rules of pleading, practice and procedure

A. The supreme court of New Mexico shall, by rules promulgated by it from time to time, regulate pleading,

practice and procedure in judicial proceedings in all courts of New Mexico for the purpose of simplifying and promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant. N.M.S.A. 1978 38-1-1

STATEMENT OF THE CASE

This matter comes to this Court on petition for writ of certiorari by a private citizen, Patricia E. McKenna, *pro se*, to review an opinion of the New Mexico Supreme Court quashing a citizens' petition for grand jury via a superintending control action under that court's original jurisdiction in which McKenna was the named and only respondent.

The petition for grand jury, certified by the Bernalillo County Clerk to bear the signatures of more than two hundred registered voters of the county as required by the enabling provision of the New Mexico Constitution's Bill of Rights, requested investigation of, *inter alia*, activities of judicial officers in the county, including district judges and prosecutors, alleging malfeasance and criminal depredations.

Superintending control was invoked in the name of the respondent herein, the District Court of the Second Judicial District, Bernalillo County, New Mexico, by W. John Brennan, its Chief Judge, challenging the validity of the petition for a grand jury on ground it did not contain allegations sufficiently detailed or specific enough to invoke a lawful grand jury investigation.

The New Mexico Supreme Court, Richard E. Ransom, Justice, authored a unanimous opinion adopting a heightened standard for content of citizens' petitions for grand jury and applied that standard to hold that McKenna's petition was invalid.

McKenna petitions here for certiorari, asserting, *inter alia*, that the rule announced is unconstitutional on its face and as construed and applied, violating the United States Constitution's Article Four, Section Four and the First, Ninth, Tenth and Fourteenth Amendments.

In June of 1991, McKenna and two other women whose names appear on the record formed a not for profit, public interest organization, named Crusaders 4 Equal Justice, with the intention of helping persons involved in

domestic relations litigation to help one another by pooling the knowledge gained from their experiences. The organization was envisioned as being a bridge between existing groups that were segregated on the basis of sex, each gender claiming that the courts discriminated in favor of the other.

As the collective pool of knowledge expanded, recurring complaints about one particular judge prompted deeper inquiry into the details of individual cases. Patterns of questionable actions seemed linked to the involvement of any pair of a select group of prominent domestic relations attorneys in a case before this judge. Issues never seemed to be settled, though arbitrary edicts were handed out that prompted expanded litigation.

Two particular matters were most prevalent; allegations of vanished money and abused children being returned to the alleged abuse with little or no inquiry. As the members of Crusaders acquired greater understanding of substantive and procedural law, they were able to discern the failure modes.

When a child alleged abuse or showed signs of abuse, if the child was the subject of a domestic relations order, rather than the matter being handled by the Department of Human Services and the District Attorney as is required by law, these two agencies abrogated their statutory responsibility. Without the due process protection of the Children's Code and stripped of the statutory immunity for those who are compelled by law to report suspected abuse, protective parents often were deprived of any contact with their children on the strength of opinion testimony, frequently unsupported by factual basis on the record, given by unqualified, unsupervised, state-employed psychologists or those who were former state employees.

The mounting evidence led to filing of complaints and reports to the city police, county sheriff, state police, the district attorney, Crimestoppers, the governor, the state attorney general, the Judicial Standards Commission, the

Disciplinary Board of the State Bar, the state Legislature, private lawyers, the chief judge of the District Court of the Second Judicial District, the state Supreme Court, the Federal Bureau of Investigation, the United States Attorney, U.S. Congressmen, newspapers and electronic media. When the words "domestic relations" were spoken, doors and minds closed.

In the summer of 1993, Crusaders drafted the petition for grand jury and began circulating it in August. Three months later, with 411 signatures, McKenna volunteered to file it, having no case before the courts. Litigants were reluctant even to sign because of the subsequent treatment some, as appellants, had received in the district court after their cases were returned. Retaliation in the context of individual cases by the likely targets of investigation was considered a strong possibility.

On December 20, 1993, petitioner filed what immediately became known as "McKenna's petition", though she had not been involved in litigation in New Mexico at all. Copies of the petition text accompanied by supporting case documents, the identifying data from which had been removed, were provided to the media and certain organizations.

The county clerk certified on December 27, 1993, that the petition bore signatures of 264 registered voters of the county.

On January 3, 1994, District Judge Diane Dal Santo, the judge who usually oversees grand jury operations in the Second District, recused. The next day, Chief Judge Brennan filed a recusal on behalf of all judges in the Second District.

On January 6, Brennan filed a letter to Richard E. Ransom, Chief Justice of the state Supreme Court, stating that all judges of the district court had recused. Brennan's letter further stated that his court was prepared to argue through counsel that McKenna's petition for grand jury was defective. Another document was filed by the clerk responsible for grand jury files, sending up a copy of the

petition for grand jury and certifying that McKenna was the only party or attorney whose name was on file. That same day, District Judge Anne M. Kass, the only judge named specifically in the grand jury petition, swore an affidavit that seven signers of the petition had cases in her court.

The affidavit, listing the names and case numbers of the seven signers along with the names and case numbers of thirteen domestic relations court litigants deduced from the accompanying documents that had been provided to a psychologists' organization, further alleged Judge Kass was told in April of 1993, that another person who had a case in her court, William B. O'Connell, Jr., had threatened to have her killed. This allegation was supported by an affidavit of Janeanne Snow, Ph.D, a former employee of the court clinic of the Second Judicial Court, who at that time was establishing herself in private practice.

Although the accused Mr. O'Connell was not found to be a signer of the petition, documents from his case were among the thirteen. A third affidavit, from attorney Karen Vandiver-Rioux, alleged O'Connell had represented to Vandiver-Rioux that he was one of those primarily involved in the petition effort. Judge Kass submitted the affidavits to the chief of police and to the city's larger newspaper, "The Albuquerque Journal", which publishes four editions, one statewide. On January 11, 1994, the "Journal" reported on the front page of its four star final edition: "Family Court Judge Reports Death Threats". The article not only mentioned O'Connell as the alleged source of the alleged threats, it reported that the decision to make a report to the police on such a stale basis had derived from a suggestion by Judge Dal Santo in a meeting of judges and attorneys called to consider how to respond to the petition for grand jury.

Although both civil and criminal rules of procedure specify that the chief justice shall appoint a judge, justice or judge pro tempore to hear a matter when all judges of a district have recused, Chief Justice Richard E. Ransom did

not take such action in response to Judge Brennan's letter.

On January 19, 1994, Chief Judge Brennan petitioned to the New Mexico Supreme Court for a writ of superintending control. The verified petition named McKenna, the petitioner here and the citizen who filed the grand jury petition, as respondent to the writ action. The next day, Bernalillo County District Attorney Robert M. Schwartz filed a motion for leave to brief amicus curiae on his own behalf and on behalf of the New Mexico District Attorneys' Association.

Oral arguments were set for February 9, 1994. By that date, the state attorney general, three trial lawyers associations and the family law section of the state bar also had asked for recognition as amici to support the district court. No order was entered recognizing the district attorney on his own behalf or recognizing the attorney general, but the attorney general later was listed on the opinion as an amicus.

McKenna filed a motion to quash on January 25, attacking the district court's pleading as being frivolous and asked for sanctions. She claimed want of a justiciable controversy on ground that all judges had recused, so there existed no uncertainty of duty, while the district court itself, as a subordinate public entity, had no defensible right at stake in the proceeding. Because no judicial officer had acted on her behalf to vest in her the ability to wreak the havoc the district court claimed was imminent, McKenna asserted want of sufficient cause to invoke superintending control and want of an essential party amenable to the writ.

McKenna's motion to quash further assaulted the subject matter jurisdiction of the Supreme Court by questioning whether the court's original jurisdiction to hear the matter of a writ could be used to exercise original jurisdiction reserved to the district court.

McKenna challenged the jurisdiction of the court to grant the requested relief on ground that the district court sought to legislate; to use judicial rule-making authority to

violate separation of powers and invade the realm of political authority of the people by altering the function of a self-executing provision of the state constitution by severely limiting the function of the grand jury system. She pointed out that a proposed amendment to the enabling provision, a matter passed by the legislature and scheduled to be placed before the public in the November general election, did not address the wide-spread abuse alleged by the district court. She asserted that the district court was asking the state Supreme Court to subject the realization of the voters' act to discretion of the reviewing judge, something that the high court, in the recent opinion the district court had cited as its authority, had ruled explicitly was not the intent of the framers of the state constitution.

McKenna argued that the only way a judge could make a legal, nondiscretionary determination that a petition for grand jury was invalid was if the petition alleged facts that showed beyond doubt that it sought investigation of matters exclusively outside the geographic area (not triable in the county) or were totally non-criminal in nature.

She asserted that the role of the court in empaneling the grand jury is a ministerial duty, once a petition is certified by the county clerk to have met the requirements of the plain language of the state constitution's enabling provision, and that the published rules of procedure specifying that the chief justice appoint a substitute judge after the recusal of all judges in a district court invoked a ministerial duty, binding on the chief justice with the force of law.

McKenna argued that questions of jurisdiction demand answer.

McKenna alleged, supported by exhibits of Judge Kass' affidavit, the resulting newspaper articles and a letter signed by Judge Kass showing that she was not filing audio tapes, the official records of her proceedings, with the clerk of the court, that the efficacy of the requested grand jury

inquiry was being placed in peril by the delay created through the district court's fraudulent petition for writ of superintending control because possible targets of investigation had used their official positions to identify and to intimidate potential witnesses and were able to conceal or destroy pertinent evidence.

In support of the request for sanctions, McKenna argued that the experience of the judges comprising the petitioning court and the background of counsel were subjective evidence of intent to file a false pleading for the purpose of delaying the process of justice.

On February 8, the day before oral argument, McKenna was served with four briefs.

When given an opportunity to respond to the argument advanced by counsel for the district court, McKenna immediately asked about the questions of jurisdiction raised in her motion to quash and the court's ruling on that motion:

J: Do you have any other questions before we begin?
M: . . . I have a question, uh, that I want to raise about jurisdiction.
J: Yes, well you may address those. I just mean procedurally, do you have any questions of us?
M: No, and I appreciate the kind words.
J: Then you may proceed.
M: Okay. Um, I wanted to address two preliminary issues before I get any further. One of them is the question of jurisdiction and, uh, secondly I wondered about the court's determination on the Motion to Quash.
J: Yes. We have not addressed that question. It–we're taking that under advisement until we have heard the oral argument today.
M: Okay.
J: If you wish to devote part of your 20 minutes in support of your Motion to Quash this petition on some grounds other than the merits, you're welcome to spend some on that if you wish because we have not specifically

ruled on it.

McKenna went on to challenge the existence of a justiciable controversy between competing constitutional interests involving herself, as messenger to the courthouse for filing the petition on behalf of the 411 signers, and the "confederation of the totality of the state's lawyers as well as lawyers' special interest groups."

In oral arguments, McKenna directly attacked the subject matter jurisdiction of the state Supreme Court to hear and determine any question of the validity of the petition for grand jury.

She raised, once again, her assertion that the real parties in interest were the 411 signers of the petition "and many others". McKenna asserted that the intent of the district court and its amici was to amend the state constitution.

McKenna then asserted that the district court's response to her motion to quash was, in fact, an attempt to change the legal and factual basis for the petition for writ of superintending control.

McKenna attacked the district court's assertion that judicial immunity precluded grand jury investigation of judges' conduct from the bench and that a grand jury could not inquire into the workings of the court system.

In the interchange that followed, the court's questions of McKenna dealt with the crimes alleged or that could be alleged for investigation by the grand jury pursuant to the petition, not any factual specifics about particular instances of a single offense. Because the record is all pertinent and is included in the appendix, Petitioner does not duplicate it here.

An important point to note is that the high court did not rule on the motion to quash until the opinion was rendered, although McKenna raised the question of the pending motion in oral argument. The court stated it was taking the motion challenging jurisdiction under advisement and proceeded to hear argument on the substance of the petition for writ and, it appears in

retrospect, on the matter whether McKenna's petition for grand jury was 'valid'. At the end of argument, the court explicitly declined to grant an alternative writ. Further, the court instructed McKenna to brief on validity and sufficiency of her petition for grand jury.

In the factual context portion of her brief on validity and sufficiency, McKenna summarized the general structure and operation of the alleged racketeering enterprise and the changes in statutes or interpretations that allowed the operation to form and flourish. McKenna explicitly charges Second Judicial District Court with unlawful destruction of public records of domestic relations proceedings, that the process was ongoing and that records were withheld routinely by judges.

The brief made reference to attached exhibits. The first was an affidavit filed by district court personnel detailing the destruction of audio tape recordings of domestic relations proceedings in almost two thousand cases. Another was the retention schedule for the district courts that was in effect at the time of the destruction.

The retention schedule consists of two parts; the original which was filed in 1979 and a 1986 amendment. The amendment read, in material part, as follows:

Item	Description	Retention Period
101	ALL COURT RECORDS Includes all civil, domestic relations, criminal, children's court, probate, adoption, and insanity records.	Permanent
	• • •	
106	COURT REPORTER'S NOTES, TRANSCRIPTS, TAPES, AND TAPE LOGS; By case; contains notes, transcripts, tapes, and tape logs of all cases heard in court.	
	A. Notes, transcripts, tapes and tape logs of civil hearings, motions and trials.	Six months after final judgment or until appellate court mandate is received or

	60 days after dismissal.
• •	•
C. Notes, transcripts, tapes and tape logs of delinquent proceedings, dependent and cases, and all other juvenile proceedings including motions and trials.	Six months after final judgment or until appellate court neglect mandateis received or 60 days after dismissal.

In point three, McKenna asserts that her petition for grand jury is valid and sufficient because it has been certified by the county clerk to have more than two hundred signatures of registered voters of the county. She points out that the district court took its arguments regarding the necessity of preventing 'vexatious' inquiries and 'fishing expeditions' from a Pennsylvania case, wherein a judge of quarter sessions directed a grand jury to inquire into a magistrate's conduct of the business of court. Counsel for the judge admitted, before the Supreme Court, that the order to the grand jury was a 'fishing expedition'. McKenna argued that her petition met the strict standards of Pennsylvania for invoking investigation of systematic criminal depredation on the citizens by public officials.

McKenna alleged that the district court and its amici asked the state Supreme Court to draft a procedural rule so crafted with intent that it be applied to McKenna's petition for grand jury as would determine the petition to be invalid, even if Cook v. Smith, the mainstay of the district court's case, had to be overturned to achieve that end. Counsel for the district court had so stated in oral argument.

McKenna asserts on the basis of Blair v. United States, 250 U.S. 273 (1919) that historically, to achieve the purpose for which it exists, the powers of the grand jury are not encumbered by prior restraint on its scope of inquiry sought by witnesses or targets of investigation.

On the basis of Blair, McKenna argued that a grand jury's jurisdiction is separate and distinct from jurisdiction of court, and only the grand jury has constitutional authority to decide issues regarding its jurisdiction. She

asserted support also from Hendricks v. United States, 223 U.S. 178.

In her point four, McKenna asserted that the grand jury's jurisdiction to investigate cannot be challenged, in sharp contrast to a court's jurisdiction to hear and determine a matter.

In point five, McKenna again asserted that her petition meets requirements for purpose invoking investigation to discover public corruption as defined by court that set more restrictive standards to achieve the regulatory purpose advanced by the district court.

McKenna argued that the district court's own cited authorities argue against remedy sought in the writ action. She asserted that the district court misrepresented Cook by transferring the responsibility for that which a grand jury is charged not to do in abuse of its discretion onto the petitioner as a burden of proof to the judge that the inquiry is legitimate as being the only means to prevent 'vexatious and odious fishing expeditions' by the grand jury. McKenna pointed out that the state Supreme Court had held that the determination of the propriety of the investigation was a matter for the grand jury to decide, not the judge.

She argued, the result reached by the state Supreme Court in Cook notwithstanding, the principles of the authorities quoted therein foreclose interstitial interpretation to interpose the decision of one officer to decide whether another would be allowed to perform his duty.

Relying on authorities cited by the New Mexico Supreme Court in Cook, McKenna asserted that the framers of the state Constitution left the determining whether a grand jury is needed as prerogative to be exercised by the people in the manner provided therein (a self-executing provision of the state Constitution).

McKenna asserted that an investigating grand jury has a duty both to the public and to potential targets. On the one hand, it is to inquire with diligence. On the other,

it is to cease when it appears that the inquiry will not lead to an indictment.

McKenna asserted that the intent of the district court's request was to reduce the petition-initiated grand jury to the same duties of protecting the accused against overzealous prosecution, stripped of its powers to inquire, except for exculpatory evidence it might believe exists (altering the substance of the right to petition).

McKenna asserted that the district court was bringing suit as a front for unnamed parties in interest who sought to confine a grand jury's scope of inquiry only to whatever evidence already is in the hands of the petitioners, especially the proposed investigation of judicial officers. She claimed that this would abolish the inquisitional function of the grand jury, crippling it especially in the area of investigating the conduct of public officials who can control access to public records as would enable them to conceal malfeasance or criminal activity from the ordinary citizen with great effectiveness, making them unaccountable.

In point six, she argued that the result reached by the state Supreme Court in Cook notwithstanding, the principles of the authorities quoted therein foreclose interstitial interpretation to interpose the decision of one officer to decide whether another would be allowed to perform his duty, especially where the power of voters to call the grand jury is vested in the state Bill of Rights, not the judicial article.

She argued Cook held that the judiciary does not have constitutional authority to refrain from empaneling a grand jury when a requesting citizens' petition is not totally without form or content. She asserted that the grand jury's authority to decide its jurisdiction is independent of judicial power, that the judiciary's role is on.y to insure independence and fairness in the selection of the panel.

McKenna point out that the district court is asking for a per se rule on the presumption that a grand jury will not carry out its duties in accordance with a charge not to

engage in vexatious, odious and oppressive fishing expeditions unless the content of the citizens' petition meets certain criteria. She cited as authority a case provided by another of the district court's amici.

McKenna argued that the recent change in the charging statute did not vest the court with absolute discretion as to the matters presented to the grand jury, but prevented the courts from restricting the grand jury's investigation only to violations of state law, that the grand jury can inquire into violations of federal criminal statutes as requested in her petition. She asserted that any possibility that the grand jury might engage in a 'fishing expedition' could be remedied by the wording of the general charge given by the court to the jurors to remind them to exercise sound discretion in gaging the merit of their inquiry.

Point seven asserted that the proposed change would use judicial rule-making to alter substance of the grand jury petition right. She asserted that the examples offered by the district court in response to her denial of 'increasing abuse of the petition right' claimed in the district court's initial pleading did not show abuse, but that the district court and the prosecutor were conspiring to prevent petition-initiated grand juries from being empaneled because these bodies have the power to initiate their own investigations into government corruption.

In conclusion, McKenna claimed: (1) The petition for grand jury is valid and sufficient; (2) Questions of investigatory jurisdiction are for grand jury to decide; (3) The district court has no authority, discretionary or nondiscretionary, to decide whether a grand jury should be empaneled based on wording, substance or content of the petition or speculation as to the motives of the petition's signers or circulators; (4) To the extent that Cook extends authority to a district judge to make any determination as to the jurisdiction of the grand jury, Cook should be overturned; (5) Even if Cook were applied to McKenna's petition, the petition would be valid and sufficient to

invoke a grand jury inquiry to discover possible corruption of public officials; (6) Supreme Court should appoint a justice to empanel a grand jury and assist its investigation.

All briefs were in by the 28th of February. When the state Supreme Court neither filed its opinion within the time limits set out in the Rules of Appellate Procedure, nor filed an explanation for the delay and stating that the pending matter would be advanced in priority, also as the Rules require, McKenna began filing monthly memoranda asking for information in compliance with the rules. The Supreme Court responded with a letter stating that the matter was being consolidated with two other grand jury petition cases for purposes of a written opinion.

The Court did not enter the letter into the case file. Calls to the parties respondent in the other two cases revealed they had received no notice of consolidation. In fact, in one case, the grand jury already had been empaneled and released to hold its proceedings. A separate opinion was filed in the second case six days after the opinion in McKenna.

The Supreme Court did not file its opinion until late September. There were no further hearings.

After the court filed its opinion granting the writ of superintending control, announcing its new rule, assuming jurisdiction to rule on the validity of the opinion, and applying the new rule to the pending grand jury petition, McKenna filed for alternative and supplementary findings of fact and conclusions of law within the time permitted by civil and criminal rules for the district courts. That document raised federal questions that were not ripe until the court announced its new procedural regimen and applied it to McKenna's petition. If a writ was issued, it does not appear in the file of the grand jury.

The motion and requested findings and conclusions were removed from the file, the filing stamp was defaced, and the papers were sent back to McKenna with a letter from the clerk of the Supreme Court stating that the case was closed by the filing of the opinion, that McKenna's

motion for alternative or supplementary findings of fact and conclusions of law had been accepted in error. On December 19, 1994, McKenna petitioned for certiorari to the United States Supreme Court.

ARGUMENT

Because the issues were decided in original jurisdiction by the state's highest court, Petitioner has no avenue in state courts to exercise the absolute right to one appeal that the New Mexico Constitution requires that the judiciary provide in its procedures. The only recourse for relief in the state lies in resort to political processes. In theory, the state legislature can overturn a court decision. This approach is inadequate security for federally protected rights created in state constitutions because it submits particular instances of the exercise or invocation of rights defined by enactments of the body politic to uncertain ratification in an inferior political forum.

Counsel admitted that the petition in question already had been circulated, filed and certified according to the requirements set forth in Article II, Section 14 of the New Mexico Constitution and conformed to the content standard the state Supreme Court had set in Cook.

The opinion of the state Supreme Court does not constitute a fair and substantial state law basis for disposing of the federal questions presented by McKenna in the course of the writ hearing. Further, McKenna had no meaningful opportunity to defend in the putative litigation that was alleged to be ongoing in an inferior court, a "case" over which the state High Court supposedly acquired jurisdiction by the writ of superintending control it granted in its opinion from the writ proceeding.

In absence of an issued writ, the state Supreme Court had no jurisdiction over any matter in an inferior court. At the end of oral argument on February 9, 1994, the state Supreme Court explicitly declined to issue an alternative writ at that time. Jurisdiction is defined as the power to hear and determine a matter. It is apparent that

the state Supreme Court took a different approach. The record suggests the justices presided over litigation of the matter from the inferior court under their original jurisdiction pursuant to the petition for writ of superintending control, then acted to acquire jurisdiction to decide the "case" by granting the writ of superintending control.

At the end of oral argument, McKenna was ordered to brief on validity and sufficiency of her petition for grand jury. Her petition, however, already had been circulated, filed and certified under the standards in force at the time, assuming, *arguendo*, that those standards, to the extent that they are of judicial origin, are valid. Now she was being asked to brief to a standard that did not yet exist, in a proceeding to decide whether the state Supreme Court would assume jurisdiction of a lower court matter.

McKenna was foreclosed from raising any federal claims in proceedings on the matter wherein the court's new rule was applied to determine the validity of her petition for grand jury. The state high court asserted jurisdiction, created the rule, applied the rule, decided that McKenna had presented no evidence that a crime colorably had been committed, and closed the case in the same document. The efficiency is admirable, but the fairness leaves much to be desired; due process, for instance.

Because the Supreme Court had "heard" the matter from the inferior court rather than appointing a judge or justice to preside, McKenna was denied the absolute right to one appeal secured by Article VI, Section 2 of the New Mexico Constitution.

Superintending control as a vehicle for this judicial legislation effort has at least four advantages: (1) Its invocation is a matter of absolute discretion of the state Supreme Court. As the facts on record demonstrate, no weight of law, including jurisdictional challenges, can prevent it being invoked. (2) It forecloses any avenue of appeal in the state courts. (3) Because it progresses rapidly in process but slow in decision, the hapless citizen has little

time to prepare a defense and no second chance. (4) It offers multiple bites at the apple for the judicial activists, first in the pleadings, briefs and oral arguments on the question of granting the writ, then in subsequent action on the matter acquired by granting of the writ, to draw out any federal questions that might be raised, permitting them to be circumvented by careful crafting of a state law ground for disposing of the matter in order to frustrate review in the U.S. Supreme Court.

The brief McKenna was ordered to submit would reveal her theory of law before the court's new standard was formulated and revealed. Just as McKenna claimed in her brief, the purpose of the entire exercise was to make a rule that would render her petition invalid.

The rule establishing procedures for extraordinary writ actions contemplates a final hearing if a writ is issued. Further, the fundamentals of due process require that McKenna should have some notice of the court's intended disposition after any rule change.

However, substantial justice is not the goal of either SLAPP suits or judicial activism. Consistent with this principle, the opinion, in a single stroke, granted the writ of superintending control, bringing the alleged litigation in the inferior court within the jurisdiction of the state Supreme Court, promulgated the new procedural rule setting standards for evaluating voters' petitions for grand jury, declared that McKenna's petition is invalid on ground that it does not meet the requirements designed to exclude it, cut off any opportunity for McKenna to add to the record and foreclosed any avenue of appeal in state court.

The record of the proceeding from which the challenged opinion issued is a prime example of the judicial conduct that prompted filing of the petition for grand jury investigation. The proceedings under the New Mexico Supreme Court's original jurisdiction by way of a petition for a writ of superintending control were a sham and a farce. Petitioner contends that the opinion is absolutely void for want of subject matter jurisdiction and for want of

due process. It is a fraud, a knowing misrepresentation of fact and law by the court that was intended to stand by intimidation, not by inherent strength.

The action was brought by the District Court of the Second Judicial District, supported in amicus briefs by the New Mexico District Attorneys' Association, the Family Law Section of the State Bar, the New Mexico Trial Lawyers' Association, the New Mexico Defense Lawyers' Association, The New Mexico Criminal Defense Lawyers' Association and the New Mexico Attorney General under the flag of preventing abuse of the grand jury system. In reality, the action is a SLAPP; a Strategic Lawsuit Against Public Participation. The purpose of such suits is not for the vindication of a legitimate right, but to intimidate, harass and oppress citizens who exercise rights secured by the Right to Petition Clause of the First Amendment to the Constitution of the United States.

The case at bar is particularly pernicious because it involves the core of the judiciary and legal profession in a scheme that goes beyond an attack on one individual for filing a petition for grand jury to investigate judges and lawyers. The District Court and its amici set out to abuse judicial rule-making authority, under the guise of regulating the grand jury process, to deprive the people of New Mexico of their right of self-government--the right to reserve unto themselves the power to call into being an investigating body that can act with speed, secrecy, broad scope and independence to discover and suppress government corruption. Respondent, amici and the state Supreme Court acted to eliminate the investigating function of the grand jury and to render a nullity the federally protected right of state voters to compel such a grand jury to be empaneled, a right secured in a self-executing provision, Section 14 of the state Bill of Rights, Article II of the New Mexico Constitution.

The court in the instant opinion wrote that McKenna had offered no allegation of fact to support any of the forty crimes alleged in her brief. No mention was

made of the documentary evidence provided to the court that records of proceedings in almost two thousand domestic relations cases had been destroyed at a time when the applicable retention schedule for the district courts, promulgated by the state Supreme Court with the force of law as a regulation of the State Records Commission, required that all records in domestic relations cases be retained permanently.

The court stated that McKenna should have provided specific facts alleged to indicate criminal conduct by judges. It makes no mention that McKenna provided documents proving that Judge Anne M. Kass, the only judge named specifically in McKenna's petition for grand jury, within sixteen days of the petition being filed had, in hand, from the "secret" grand jury files, the list of persons who signed the petition, and that Judge Kass was using her judicial position and prestige publicly to harass and intimidate potential witnesses.

Nowhere in the opinion does the state Supreme Court address McKenna's challenge to the validity of Cook on ground that the right of two hundred voters to compel a judge to order that a grand jury be empaneled, pursuant to Article II, Section 14 of the state constitution, is an exercise of political power over which the judiciary has no authority whatsoever.

The court announces in the opinion that it grants the petition for writ of superintending control requested by the District Court of the Second Judicial District. Nowhere does the court point out that it issued no preliminary writ to obtain jurisdiction to hear and determine any matter from the district court until the written opinion or that McKenna was not given an opportunity to show cause that her petition for grand jury should not be denied per the new rule, no chance to object on ground that the new regimen on its face, or as construed and applied, violates the Constitution of the United States.

This case involves the use of judicial process to affect a political institution, to change the structure of state

power as established in the New Mexico Constitution, to take a specifically reserved function of government out of the hands of the people.

New Mexico is one of only two states which reserves to the people in the bills of rights of their state constitutions the right to compel a judge to empanel an investigating grand jury by presenting to the judge a petition signed by a certain number of voters.

Three interacting systems of rights are involved: (1) The right of the people to establish by a written constitution the form of their government and to the full effect of that declaration, specifically to the protection against corruption in government afforded by the independent oversight powers of the petition-initiated grand jury; (2) The right of a specific group of citizens exercising that political authority delegated to them by Article II, Section 14 of the New Mexico Constitution to do so without interference from anyone, especially public officials acting under color of state authority; (3) The right of those who so desire to appear before this grand jury to offer evidence of activity believed by the citizens to constitute criminal conduct and acts of malfeasance by public officials. These particular proceedings in the lower court, by their nature and intent, implicate Petitioner's personal, federally protected right to petition the government for redress of grievances without obstruction or retaliation by injury, intimidation, harassment or oppression for having exercised her rights.

The judiciary and attorney general treat this invocation of the grand jury petition power only as an abuse of an individual right, with a presumption of nuisance intent. Even if this were true, the people of New Mexico have declared in their state constitution an insistence on accepting that risk in exchange for the benefit derived. Government officials, whether executive, judicial or legislative, have no authority to override that fundamental choice, to interfere with its exercise or to refuse to carry it into effect.

In this case, government has rebelled against the people and is forcing upon them a form of government foreign to their choice and experience. They have been denied, by the police powers of the state, a government representative of themselves.

The grand jury section of the New Mexico Bill of Rights, N.M. Const. art. II, s.14 provides three ways for a grand jury to be called; at the discretion of a judge, by a petition of two hundred voters of the county, or by any manner provided by law. It was intended by the framers to be self-executing and inviolate, as indicated by two portions explicitly stated as being modifiable by the legislature, those having to do with the number of grand jurors and the margin necessary to indict. No such caveat is attached to the voters' petition right. [FN artII] [FN Rogers]

The district court's argument and the Supreme Court's opinion in this case are based on a 1982 opinion of the New Mexico Attorney General, finding that courts have discretion to decide whether grand juries are empaneled pursuant to voters' petitions. [FN OAG 82-14] The attorney general's opinion relies heavily on McNair for its argument that the power to call grand juries must be controlled. It does not point out that the problem in McNair was the result of a judge invoking a grand jury on his own authority, admittedly for a 'fishing expedition'.

There is a second and fatal flaw to adopting the attorney general's reasoning. It is stated in his opinion that the conclusions assume the grand jury is subordinate to the court. A year earlier, the state Supreme Court ruled that the grand jury is independent of all three branches of government.

The United States Supreme Court, in United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), pointed out that the grand jury is a pre-constitutional institution, given constitutional stature by the Fifth Amendment but not relegated by the Constitution to a position within any of the three branches of the government. "The federal grand jury is a constitutional fixture in its own right ...." Nixon v. Sirica, 487 F.2d 700, 712 n. 54 (D.C.Cir.1973); United States v. Chanen,

549 F.2d 1306 (9th Cir.), cert. denied, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977).

In fact, under the common law and constitutional provisions, the grand jury is considered to be an independent agency from both the Executive and the Judicial Departments, with "both court and prosecutor play(ing) supportive and complementary roles." Chanen, supra at 1312.

In Chanen, the court held that courts should not encroach upon the manner in which the prosecutor presents the government's case to the grand jury "unless there is a clear basis in fact and law for doing so", because it "could readily prove subversive of the doctrine of separation of powers." Id. at 1313. "But under the constitutional scheme, the grand jury is not and should not be captive to any of the three branches." Id. at 1312. Buzbee v. Donnelly, 96 NM 692, 695, 634 P.2d 1244, 1247 (1981).

The district court asserts that the grand jury does not or should not have authority to inquire into the operations of government. The two Oklahoma decisions cited in Cook and McKenna hold the opposite to be true. Ogden was decided in 1955, before Oklahoma had enacted any legislation with respect to the petition clause, Oklahoma Constitution art. II, s.18. As in the New Mexico Constitution, Article II of Oklahoma's Constitution is its state Bill of Rights. The Ogden court held that the investigating grand jury had the Constitution as its guardian, and inquiry into government functions is inherent in the concept of a grand jury. The Harris court explained the general powers of a grand jury and the effect of the wording of a charging statute in the context of statutory regulation of petitions to require some specification of the direction of inquiry.

The Supreme Court tries to make its opinion appear as though the rule it was applying to McKenna hadn't been changed since the petition was filed, so to avoid the state constitution's prohibition against applying new rules of procedure to affect the rights of parties in pending cases.

"This Court will promulgate proper rules governing disqualifications. However, because this is a pending case, we are prohibited from applying the new rules to the present case. N.M. Const. art. IV, Sec. 34; Marquez v. Wylie, 78 N.M. 544, 434 P.2d 69 (1967); State v. Gallegos, 91 N.M. 107, 570 P.2d 938 (Ct.App.1977); State v.

DeBaca, 90 N.M. 806, 568 P.2d 1252 (Ct.App.1977).' State ex rel. Gesswein v. Galvan, 100 N.M. 769, 773, 676 P.2d 1334, 1338 (1984).

It is the public's interest in the functions of the grand jury and the self-executing process by which the petition-initiated grand jury is secured that gives rise to the assertion that Article Four, Section Four is implicated, though the Ninth Amendment penumbra may extend to the grand jury in light of the fact that it predates the Constitution. Ogden Petitioner contends the state court altered the substance of the grand jury right and function by arbitrarily reinterpreted the state constitution to find that 'shall' is not imperative in the context of compelling a judge to empanel a grand jury pursuant to petition that meets the requirements set out in the constitution. To Petitioner's knowledge and belief, a federal challenge to a the power of a state's highest court to misconstrue deliberately a state constitutional provision that conveys a federally protected right is an issue of first impression.

It is explicit in state law that the Supreme Court may not use its rule-making power to affect substantive rights. Sec. 38-1-1. Exercise of judicial power is subject to the same constitutional limitations as legislative authority. N.A.A.C.P. v. Alabama,

Petitioner had every reason to expect either that the court intended to appoint a judge as requested or, if it adopted a change in procedures affecting the status of her petition, that she would be given notice and an opportunity to address the changes. Petitioner reasonably could not have anticipated the radical action on the part of the trial court. In evaluating for purpose of review of federal questions, Petitioner should not be required to anticipate a ruling that violates every principle and precedent of state and federal law.

Petitioner contends that the petition for grand jury that she filed met the standard of Cook in that it was not without form or content and did not allege matters outside the grand jury's scope of inquiry. The Court simply changed the form and content requirement to that of an

indictment, with a few minor changes to protect the guilty. Petitioner expected that the trial court would follow the law. Instead, the opinion addressed only those portions of Petitioner's pleading, oral argument and brief that the court believed it could overcome. Its peremptory issuance of the writ concurrent with the new 'standard' for voters' petitions, crafted to ensure that her petition failed and applied in derogation of state case law that applied to rules of procedure and evidence the same prohibition in the state constitution against legislative enactments that alter the rights of parties in pending cases. Petitioner contends that this was a denial of due process for want of a meaningful hearing by an order that the court did not have subject matter jurisdiction to grant. Petitioner contends the order was a subterfuge to avoid review of the federal questions by creating a fraudulent state law basis for disposing of the petition for grand jury.

Having to litigate at one's own expense for the purpose of acting as a prosecutor, after having acquired all the evidence to support an indictment, then risking exposure to the perpetrators by public disclosure that one possesses such knowledge during the interminable process the court has imposed before a grand jury can be called. In the case of Pino, almost a year had elapsed between the filing of the petition for grand jury and the court's ruling that the petition was valid

Even if it were assumed that the courts could regulate petition-initiated grand jury investigations, the regulatory scheme imposed unnecessarily infringes on the public and private interest in the grand jury process. It attacks all four of the characteristics of the grand jury that are essential to the body politic and to individual citizens; secrecy, scope, speed and independence.

The chilling effect of lack of secrecy, delay in initiating an investigation, restricting the scope to matters that the petitioners can prove, and having the grand jury subject to the court it is being asked to investigate appears on the record in Petitioner's own dilemma.

A close and literal construction deprives [constitutional provisions] of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746

Petitioner's was entitled to rely on the requirements announced in Cook in selecting the wording for the petition, notwithstanding her challenge to the authority of the court to make any decision on a petition's validity beyond whether the county clerk found it to bear a sufficient number of voters' signatures. Applying an enhanced standard, especially one that is *ex post facto* and *pro hac vice* as the court's rulings appear to be, denies Petitioner due process. N.A.A.C.P. v. Alabama,

Petitioner was before the state Supreme Court on February 9, 1994, for oral argument on a petition for writ of superintending control. The issue was whether the high court should intervene to control the course of 'ordinary litigation' to prevent the sort of irreparable mischief and all the other dire predictions expounded by the district court. Except there was no 'ordinary litigation' going on in an inferior court. No judicial officer had acted or was in a position to act on Petitioner's behalf so as to precipitate the disasters alleged by the district court. In all the authorities cited by the district court, its amici and the state Supreme Court in its opinion on the question raised by McKenna on the jurisdiction pursuant to superintending control, not once did the court totally usurp the original jurisdiction of the inferior court. In all cases, a judge had acted or was in the process of acting in a manner that made him amenable to the writ.

The district court also had raised the question of the validity of the petition for grand jury, but that question was not properly before the court for a number of reasons. It has already been mentioned that the lower court had not ruled on the question. Further, without issuance of the writ, the matter was not before the state high court. Granting the writ conveys the jurisdiction. The state Supreme Court treated the case as though it could hear whatever it wanted without regard to jurisdictional

prerequisites, so long as it granted the writ at the time it made a determination.

The district court could not bring a question of the validity of the petition before the court. Prosecution or defense of suits on behalf of the state in the Supreme Court is reserved by the state constitution to the sole authority of the attorney general.

The procedural rule in effect at the time of the hearing and briefing was the standard set out in Cook. McKenna was ordered to brief on validity and sufficiency of her petition for grand jury. The only light in which her participation in the proceeding can be viewed is as a commentator on the proceedings. Her rights could not be put at risk in absence of subject matter jurisdiction in a matter brought properly before the court by proper parties with a justiciable controversy. She could not be bound in a later proceeding to the contention that the hearing she received by favor of the court in the putative writ proceeding was an adequate substitute for the sort of due process that the law requires. Coe

A judgement, decision or order of court that is entered without due process is absolutely void and of no legal effect. Griffin The arguments above apply to this question as well.

The district court, represented by a private attorney, actually was using a public entity to front for private interests. With collusive support from the chief justice in his delaying appointment of a judge, McKenna was served as a private citizen, rather than being represented by the attorney general in the district court's assault. Using a writ action accelerated the timetable to prevent McKenna from having much time to find counsel or to prepare a case on her own. Use of the prestige of all nineteen judges and the rapid appearance of amici representing every trial attorneys' organization and the attorney general was an intimidation tactic directed both at McKenna and at any member of the legal profession who might otherwise have considered representing her. The

goal was to frighten her into a default so that the state constitution would be undefended in the judicial conclave that was being assembled to attack it, down to the request for oral argument and hitting Petitioner with five briefs the afternoon before. This is anti-public interest litigation. The goal is to discourage exercise of rights secured by the right to petition clause of the First Amendment to the Constitution of the United States.

What elevates this to a strategic lawsuit against public participation or SLAPP is the fact that the suit was fraudulent. The instigator had no legitimate right to vindicate. It was purely a 'might makes right' ploy that could not have any hope of succeeding without cooperation from the court. The record leaves no doubt that the opinion is an arbitrary edict.

To Petitioner's knowledge, it is a question of first impression whether this Court would impose sanctions in an action on review from a state court. Chambers v. NASCO, Inc., 501 U.S. 32, 47, 111 S.Ct. 2123, 2134, 115 L.Ed.2d 27 (1991).

Petitioner contends that the state courts, by their conduct, have waived the state's right to rule on any federal question that can be found in this case. The presumptions on which comity is based have been penetrated. The state courts have acted deliberately counter to their solemn duty to uphold the United States Constitution. N.A.A.C.P. v. Alabama,

> . . . [I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Boyd, *supra*.

The encroachments here hardly can be termed 'stealthy'.

This Court's policy is to decide a case based on issues that avoid constitutional questions. The state court may have created deliberate jurisdictional defects with that policy in mind, so that this Court will remand to put the questions before the state courts again. Going through the

sort of marathon litigation involved in N.A.A.C.P. v. Alabama serves the purposes of those who want to frustrate the function of the grand jury. Endless delay and distraction from the original purpose are two goals of a SLAPP.

The state court construes this statute to vest the district judge with discretion to deny a petition for grand jury on other ground than lack of sufficient signatures and to restrict the scope of the grand jury's inquiry as the judge sees fit. The Oklahoma Supreme Court in Harris exploded that myth. In recognizing that there are at least two ways a grand jury can be called, either at the judge's discretion or by petition, that court concluded the mandatory provisions of the Oklahoma grand jury charging statute was targeted at those grand juries empaneled pursuant to a judge's discretion. It did not enlarge the powers of the grand jury, only ensure that each was tasked to do certain specific things over and above the judge's discretionary assignments.

In this light, and considering the principle that neither the Legislature nor the judiciary can override the will of the people as expressed in their constitution, to construe the elimination of the former mandatory elements of the charge as granting the judge discretionary authority over the scope of inquiry of a petition-initiated grand jury denies the people the power of self-government secured by the federal constitution in the Ninth and Tenth Amendments and Article Four, Section Four of the U.S. Constitution.

Such a construction also is absurd because it renders the petition-initiated grand jury equivalent to the one empaneled by judicial discretion. If a judge can order a grand jury empaneled, he or she presumably can and must do so under the court's duty to uphold the law if even one person, not even a voter, presents a claim of criminal conduct that the proper authorities will not investigate or prosecute. To vest the judge with authority to deny a certified voters' petition renders the signature requirement

meaningless. The section only has meaning if 'shall' is an absolute imperative.

This question was briefed by both parties, for what that is worth under the procedural circumstances. It is an important part of McKenna's petition, however, because of the appearance that the state Supreme Court will not give effect to state criminal actions brought against judicial officers. The geographic limits of inquiry by common law grand juries may have been related more to the fact that magistrates could hear felony cases than any inherent reason. With district judges able to act anywhere within the state, and federal judges also, the terms 'public offense' and 'triable in the county' may apply again only to the grand jury empaneled at the discretion of the district court judge. The petition-initiated grand jury, as an agent of the people, well could be amenable to the power to investigate and submit an information to federal prosecutors or federal courts, even if it could not indict for the offense.

The state Supreme Court informed McKenna, in response to her prompting about required entries in the file when rendering of the opinion was delayed, that her 'case' was being consolidated with two others. But the opinions ultimately were rendered separately. As has been argued previously, the factual circumstances were nearly identical, with the preponderance more in favor of granting McKenna's petition since irrefutable evidence was presented of destruction of records contrary to the retention requirement.

CONCLUSION

The pending amendment to the state Constitution passed, increasing the number of voters' signatures required in Bernalillo County to two percent of the registered voters, or about 4600 valid signatures to certify the petition. By delaying denial of McKenna's petition, she will need to obtain twenty-three times as many signatures.

McKenna contends that the power to invoke an investigating grand jury in the manner provided in the state Bill of Rights is an application of voter franchise under

political authority delegated by the body politic. Article II, Section 14 of the New Mexico Constitution allows 200 voters of a county to bring into being a special constitutional entity that can exercise, in an enhanced form, a specific power normally vested only in an elected public official of the county. The New Mexico Supreme Court's opinion in Cook v. Smith, by fiction of interstitial interpretation, subsumed this fundamental political right into the genus *litigation*, subjecting it to the authority of the judiciary to regulate pleading, practice and procedure. Now, in McKenna, the same court uses its rule-making authority to eliminate the special investigating function of the grand jury and to burden its invocation with such intricate procedural baggage as to denude it of any practical utility in its constitutionally intended role.

If explicit, unambiguous exercises of political power by the people in declaring how they shall be governed can be felled by a "We don't think it's a good idea so it must not have been the framers'/legislature's intent" rule of statutory and constitutional construction, then the concept of constitutional democracy is in peril. In such a framework, substantive law cannot give a citizen any clear idea of his rights, duties and responsibilities.

This Court should grant certiorari to establish or reinforce exceptions to its doctrines of comity and federalism where the presumption that state courts give fair interpretation to state laws and constitutions is penetrated by facts of a case showing that judicial authority to interpret common law or statutes and the Constitution of a state is used as a subterfuge to deny state created, federally protected rights by construing the founding provision to eliminate the protected right.

Aside from its in rem purpose to eliminate investigating grand juries, the in personam intent of the opinion was to drive home to McKenna that the judiciary could act any way it desired, without regard to fact, law or Constitution, state or federal. Petitioner asks that this Court order the matter submitted to a federal special grand

jury assisted by a special prosecutor that is not licensed to practice law in the State of New Mexico and a federal judge whose bench is not in the Tenth Circuit.

The conduct of New Mexico's highest court, its largest district court, its Attorney General, prosecutors and the State Bar is so far beyond the bounds of propriety that, if the targets of McKenna's petition were to be indicted by a state grand jury upon remand, the people of New Mexico reasonably cannot expect that the public interest in enforcement of the state's criminal statutes will receive a meaningful hearing before an impartial tribunal, either in original jurisdiction or on appeal.

Patricia E. McKenna, pro se

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT,
Petitioner,
vs. NO. 21,881

PATRICIA E. MCKENNA
Respondent.

ORIGINAL PROCEEDING

Freedman, Boyd, Daniels, Peifer,
Hollander, Guttmann & Goldberg, P.A.
Charles Daniels
Albuquerque, NM for Petitioner

Patricia E. McKenna
Albuquerque, NM Pro se

Bridget U. Lotze
Taos, NM

Barbara Shapiro for Amicus Curiae Family
Albuquerque, NM Law Section Board

Hon. Robert M. Schwartz, District Attorney
Steven S. Suttle, Ass't Chief Deputy District Attorney
Albuquerque, NM for Amicus Curiae District Attorneys' Ass'n

Hon. Tom Udall, Attorney General
Mary Catherine McCulloch, Assist Attorney General
Santa Fe, NM for Amicus Curiae Office of the Attorney General

Ray Twohig, P.C.
Ray Twohig
Albuquerque,NM

for Amicus Curiae New Mexico Criminal Defense Lawyers' Ass'n

Maureen A. Sanders
William Carpenter
Tracy McGee
Albuquerque, NM

for Amicus Curiae N.M. Trial Lawyers Ass'n and NM Defense Lawyers Ass'n

OPINION

RANSOM, Justice.

The Second Judicial District Court petitioned this Court for a writ of superintending control, asking generally for guidance and assistance in controlling and regulating the proper exercise of special grand jury petitions allowed by the New Mexico Constitution. See N.M. Const. art. II, 14 (providing that two hundred registered voters may petition the district court to convene a grand jury). The District Court also asks that we specifically decide the legality of the grand jury petition in question. At issue is our holding in Cook v. Smith , 114 N.M. 41, 45, 834 P.2d 418, 422 (1992), in which we stated that a district court has a "residuum of supervisory authority over the convening of [a] grand jury" and that "the district court must make ... a determination of the legality of the proposed grand jury inquisition." We assume jurisdiction of this case pursuant to Article VI, Section 3 of the New Mexico Constitution and articulate some further standards for determining whether a public initiated grand jury petition is valid. We determine that the petition in question is invalid.

Facts and proceedings. On December 20, 1993, Patricia E. McKenna filed a petition in the Second Judicial District Court seeking to convene a grand jury. In its entirety the petition reads as follows:

"COMES NOW Patricia E. McKenna and hereby submits the Petition of over two hundred voters in Bernalillo County to empanel a grand jury with a Special Prosecutor to investigate and, if appropriate, to indict, Second Judicial District Judge Anne M. Kass and any other judge and/or officer of the Court, those persons in the Office of the District Attorney, the Department of Human Services, and any person or other public or private agency that have engaged in acts of misconduct or abuses of authority resulting in the perpetuation of child abuse, extortion, violations of civil rights, and other wrongdoing or violations of law."

The Bernalillo County Clerk verified that the petition contained the requisite number of voters' signatures. Thereafter, because the petition named one judge of the District Court explicitly and named all of its judges and court employees implicitly, the judges determined that they should recuse themselves as a matter of judicial ethics. The District Court notified this Court of the recusals and filed the petition for a writ of superintending control.

Court's authority under superintending control. The New Mexico Constitution grants this Court "superintending control over all inferior courts." N.M. Const. art.VI, 3. "The power of superintending control is the power to control the course of ordinary litigation in inferior courts ...." State v. Roy , 40 N.M. 397, 421, 60 P.2d 646, 661 (1936). Inherent within that power is the authority to regulate pleading, practice, and procedure in the district courts. Id. at 422. 60 P.2d at 660. We exercise this authority by promulgating rules that regulate pleading, practice, and procedure, see Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 310, 551 P.2d 1354, 1357 (1976), cert. denied , 436 U.S. 906 (1978); by issuing opinions or decisions, see Alexander v. Delgado, 84 N.M.717, 718, 507 P.2d 778, 779 (1973); by issuing administrative orders, see Russillo v. Scarborough, 935

F.2d 1167, 1173 (10th Cir. 1991); and by issuing extraordinary writs, see Roy , 40 N.M. at 422, 60 P.2d at 661.

Although our jurisdiction under superintending control seemingly is boundless, see Roy , 40 N.M. at 422, 60 P.2d at 662, we have stated previously that we will exercise that jurisdiction through the use of writs in exceptional circumstances only, see State ex rel. Transcontinental Bus Serv., Inc. v. Carmody , 53 N.M. 367, 378, 208 P.2d 1073, 1080 (1949). In Carmody we said that "this [C]ourt may intervene by an appropriate writ in an exercise of its power of superintending control, if the remedy by appeal seems wholly inadequate . . . or where otherwise necessary to prevent irreparable mischief, great, extraordinary, or exceptional hardship[, or] costly delays and unusual burdens of expenses." Id. (citation omitted).

Using these standards, this Court has used its power of superintending control to address issues "of great public interest and importance," State Racing Comm'n v. McManus , 82 N.M. 108, 110, 476 P.2d 767, 769 (1970), in which "our refusal to entertain jurisdiction might amount to a denial of justice," id. at 111, 476 P.2d at 770. We also have used this authority when it was the only means available "to maintain the integrity of our court system and the respect in which it is held." State ex rel. Anaya v. Scarborough, 75 N.M. 702, 712 13, 410 P.2d 732, 739 (1966). We will not, however, use our power of superintending control simply because the parties expect the matter to be appealed eventually. See State ex rel. Oil Conservation Comm'n v. Brand, 65 N.M. 384, 388 89, 338 P.2d 113, 116 (1959). "The [power of] superintending control will not be invoked merely to perform the office of an appeal." State Game Comm'n v. Tackett , 71 N.M. 400, 404, 379 P.2d 54, 57 (1962).

McKenna challenges the exercise of superintending control in this case on several grounds. First, she argues in essence that because she is not a judge or a member of the judiciary this Court cannot use its superintending authority

to issue a writ to her. In acting, however, this Court is not issuing a writ to McKenna; we are taking control of the course of the litigation in this case. By issuing the writ of superintending control, we are informing the recused judges of the District Court that we deem this case to be sufficiently important that we are deciding it directly rather than designating a judge of another district court.

McKenna also contends that the District Court's petition for a writ of superintending control is premature and deficient because the District Court has not shown how it would be harmed if another district court actually ruled on the petition to convene a grand jury. We agree with McKenna that "[a]nticipation of a ruling, the execution of which might be damaging," is not alone sufficient grounds to invoke our supervisory authority . We believe, however, that allegations of judicial misconduct and abuse raise matters of significant public interest. Further, as we determined in State ex rel Anaya, this Court has a strong interest in preserving the integrity of the judicial system and in ensuring that "traditional respect and high regard in which courts generally are held will in no way be encroached upon." 75 N.M. at 710, 410 P.2d at 737.

Finally, the District Court argues that superintending control is proper in this case because McKenna's petition is vague and overly broad. McKenna responds that a more specific petition should not be required because, once empaneled, the grand jury's inquiry is not limited to the allegations in a petition. McKenna bases her contention on State ex rel. Deschamps v. Kase, 114 N.M. 38, 39, 834 P.2d 415,416 (1992), in which this Court held that a judge must charge the grand jury with the duty of investigating any public offense. McKenna's argument fails for two reasons. First, our decision in Deschamps was based on our interpretation of NMSA 1978, Section 31-6-9 (Repl. Pamp. 1984). The legislature has since amended Section 31-6-9, see 1993 N.M. Laws, ch. 71, ¶ 1, and the mandatory language requiring the district judge to allow the grand jury to inquire into any

public offense has been deleted. Under the amended statute the district court may limit the grand jury's investigation to those specific incidents identified in the petition. See NMSA 1978, 31-6-9 (Cum. Supp. 1994) ("The district court judge convening a grand jury shall charge it with duties and direct it as to any special inquiry into violations of law that he wishes it to make.").

Second, a grand jury's inquiry always has been limited. In Deschamps , 114 N.M. at 39, 834 P.2d at 416, and in Cook v. Smith , 114 N.M. 41, 45, 834 P.2d 418, 422 (1992), this Court stated that the grand jury is not allowed to engage in a "fishing expedition." [T]he common law does not endow a grand jury with an unlimited charter to forage for unlawful conduct on speculative whim." Cook , 114 N.M. at 45, 834 P.2d at 422. Accordingly, as explained in further detail below, the petition to convene a grand jury must contain sufficient information to enable the court to determine whether the petitioners seek a legitimate inquiry into alleged criminal conduct or malfeasance of a public official or whether the petitioners seek nothing more than a witch hunt.

Sufficiency of grand jury petitions. We continue to respect the sanctity of the public's constitutional right to petition the courts to convene a grand jury. See Cook , 114 N.M. at 43, 834 P.2d at 420. We will not limit the ability of individual citizens to seek legitimate redress for the criminal wrongdoing or malfeasance of public officials, because this would offend the balance struck by our constitution between the government and the people. We also continue to believe that, in seeking such redress, the petition to convene a grand jury "need not articulate specific allegations of crime," but need only "delimit an area of inquiry that colorably lies within the permissible scope of grand jury inquiry." Id. at 45, 834 P.2d at 422. To require petitioners to specify factual support for each element of the alleged crime would be overly burdensome on the right to petition the courts to convene a grand jury.

In addition to the concepts set out in Cook, we also

believe that a petition to convene a grand jury need not name persons specifically, because grand juries investigate crimes or acts of malfeasance, not people. See Hendricks v. United States , 223 U.S. 178, 184 (1912) (stating that identity of offender normally is developed by the grand jury); see also Blair v. United States , 250 U.S. 273, 282 (1919)("[E]xamination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual."). Instead, the petition is valid so long as the grand jury is able to discern potential targets.

Under the common law, however, there are several factors that will remove a petition from a grand jury's "area of inquiry." If the alleged conduct took place outside the geographic boundaries of the grand jury's jurisdiction, the grand jury does not have the authority to determine if such conduct justifies indictment or removal. Cook, 114 N.M. at 45, 834 P.2d at 422. Further, if the applicable statute of limitations has run, the person who is the subject of the inquiry cannot be convicted for the alleged conduct and thus the grand jury cannot issue an indictment. Id. Finally, if the petition alleges conduct that is not proscribed by New Mexico law, inquiry into such conduct historically falls outside the purview of the grand jury. See id. (stating that grand juries may inquire only into public offenses; "that is, criminal conduct or malfeasance proscribed by state law"); see also NMSA 1978, 31-6-6(A)(1) (Repl. Pamp. 1984) (setting out oath to grand jurors; stating that jurors must "diligently inquire" into public offenses). [1] The grand jury petition is not the proper vehicle for those who simply disagree with the actions of public officials who have exercised the duties and responsibilities of their office. For a district court to determine the legality of the proposed grand jury inquiry, the petition necessarily must allege facts that would identify for a grand jury just what criminal conduct or malfeasance plausibly has been committed.

Application of the standard. District court judges must examine the petition to determine whether " on its

[1] The judge reviewing the petition should consider that the alleged conduct may be protected under judicial immunity if the subject of the inquiry is a member of the judiciary. See Collins ex rel. Collins v. Tabet , 111 N.M. 391, 396, 806 P.2d 40, 45 (1991) (describing judicial immunity). In doing so, however, the reviewing judge should also recognize that judicial immunity does not relieve a person from the consequences of criminal conduct. See N.M. Const. art. IV, ¶ 36.

face [it] delimit[s] an area of inquiry that colorably lies within the permissible scope of grand jury inquiry." See Cook , 114 N.M. at 45, 834 P.2d at 422 (emphasis added). If geographical jurisdiction exists, if the applicable statute of limitations has not run, and if the petition sets forth facts upon which a grand jury could determine just what criminal conduct or malfeasance colorably has been committed, then the petition is facially valid.

This, however, may not be the end of the inquiry. As part of its "residuum of supervisory authority," id. , the reviewing court may consider matters beyond the face of the petition if necessary to determine the petition's legal validity. In such a review, the judge is not to decide whether the allegations in the petition demonstrate probable cause that a crime or act of malfeasance has been committed; that determination is to be made by the grand jury, see Buzbee v. Donnelly , 96 N.M. 692, 696, 634 P.2d 1244, 1248 (1981). Further, the judge is not to inquire into the motives behind the filing of the petition. See State ex rel. Harris v. Harris , 541 P.2d 171, 173 (Okla. 1975) (stating that the court may not impugn the motive of the petitioners because such "is the function of the grand jury"). Although the named petitioner may have ulterior motives in filing the petition, it would be nearly impossible to determine that every one of the signatories had the same improper motive. This is not to say that a petition may not be denied because it is being used purely for political harassment or because the pervasive motive for bringing the petition is otherwise inappropriate; but, if the petition does allege the requisite facts, impliedly there is a legitimate basis for the petition independent of any

illegitimate political motives.

A hearing may be appropriate but is not required. In the briefs, both the parties and the amici request that we mandate an evidentiary hearing before ruling on the validity of a petition. In some cases a hearing might be appropriate, particularly when there is evidence that the grand jury would not have jurisdiction to conduct the inquiry. A district court may use its discretion and hold an evidentiary hearing prior to convening the grand jury or denying the petition. The purpose of such a hearing could be the resolution of ambiguity or an assurance that there is evidence to make plausible the allegations of criminal conduct or malfeasance the question being whether the inquiry is legitimate. We again caution the district court that if a hearing is held, it is not within the province of the court to determine whether the allegations in the petition demonstrate probable cause that a crime or act of malfeasance has been committed or whether the named petitioner has improper motives in bring the petition.

Application of the standard to this case. Because the record contains both the petition and a full enumeration of the facts surrounding the petition, we exercise our power of superintending control to review the validity of McKenna's petition. Examining the petition on its face, we do not believe that it alleges sufficient facts to allow a grand jury to determine that the judges of the District Court may have committed some crime or some act of malfeasance. The petition itself alleges only that the judges, along with several other officers or employees of the court and government agencies, committed some unspecified acts "resulting in the perpetuation of child abuse, extortion, violations of civil rights, and other wrongdoing or violations of law." The petition provides no detail whatever of alleged acts of misconduct or abuses of authority that might constitute a crime. At most, the petition alleges that the named defendants "have engaged in acts of misconduct or abuses of authority." Without minimal detail of acts of misconduct or abuse of authority,

we cannot say that on its face the petition "delimits an area of inquiry that colorably lies within the permissible scope of grand jury inquiry."

In her brief on the validity and sufficiency of the grand jury petition, McKenna asserts that the petition could have included several other "allegations of criminal offenses ... regarding widespread corruption in Bernalillo County." We cannot find, however, any factual detail whatever for the over forty allegations made in the brief. Key to our decision in Cook was that the petition there requested investigation into highly publicized acts of malfeasance of public officers. See 114, N.M. at 46, 834 P.2d at 422. Because neither McKenna's petition nor brief contains factual allegations from which a grand jury might determine that a crime or act of malfeasance might have been committed, we must conclude that this petition calls for a fishing expedition (or worse, a witch hunt). Because of the importance of the integrity and respectability of our judicial system, we cannot allow such an expedition.

This case provides a perfect example of why the court reviewing a petition should not look into the motives of the named petitioner. Many of the briefs refer to McKenna and her supporters as "disgruntled domestic relations litigants." This descriptive phrase is used in reference to an unsupported statement that the motive behind McKenna's petition is to harass the judges of the District Court because of controversial rulings. While we do not doubt that many of the signatories to the petition are in fact individuals who are not pleased with the outcomes of their domestic relations cases, we cannot find evidence (and none was provided) that all of the signatories fall into that category. There is a danger that a judge may be convinced to deny erroneously a petition because some of the petitioners are improperly motivated. Such action would be a deprivation of the right to petition for a grand jury.

McKenna may not amend the petition without securing the requisite number of signatures. As a final

argument, McKenna contends that she should be able to amend and refile the petition, and for analogous support she cites Okla. Stat. Ann. Title 38, Section 102 (West 1990). Under Oklahoma law, however, a petition to convene a grand jury must be filed with the district court for a determination of validity "prior to the obtaining of any signatures upon such petition." Okla. Stat. Ann. tit. 38, 101 (West 1990) (emphasis added). Within four days of filing, the district court must enter an order stating whether the petition is facially valid. Id. ¶ 102. If the court determines that the petition is invalid, it quashes the petition and the petitioners have two days to amend the petition to comply to the judge's order. Id. Thus, under Oklahoma law, before a petition may even be circulated for signature it must be determined to be valid. As in New Mexico, there is no provision in Oklahoma law for amendment of a petition after it has been circulated and signed.

In this state the threshold inquiry into the validity of petition to convene a grand jury is quite minimal. Because of the general nature of our minimal requirements, we believe it necessary that petitioners not be allowed merely to amend and refile a petition. Even the slightest amendment may amount to the addition of new allegations of crime with which the original signatories would not agree. Therefore, if a judge determines that a petition is invalid, that petition may not be amended and refiled without first securing the required number of signatures.

Conclusion. We grant the petition filed by the Second Judicial District Court and exercise our power of superintending control in this case. We hold that McKenna's petition to convene a grand jury is not valid as a matter of law because it does not state sufficient facts to allow a grand jury to determine just what crime or act of malfeasance plausibly has been committed. McKenna's petition, therefore, is denied, as is her motion to impose sanctions.

IT IS SO ORDERED. (signature)
RICHARD E. RANSOM, Justice

WE CONCUR:
(signature)
SETH D. MONTGOMERY, Chief Justice
(signature)
JOSEPH F. BACA, Justice
(signature)
GENE E. FRANCHINI, Justice
(signature)
STANLEY F. FROST, Justice

(STATE SEAL)
STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT

W. JOHN BRENNANPOST OFFICE BOX 488
CHIEF JUDGE ALBUQUERQUE N.M. 87103
DISTRICT COURT 505/841-7499

January 6, 1994

Chief Justice Richard E. Ransom
Supreme Court Building
237 Don Gaspar
P. O. Box 848
Santa Fe, New Mexico 87504-0848

RE: PETITION TO IMPANEL GRAND JURY -
DECEMBER 20, 1993

Dear Chief Justice Ransom,

Enclosed please find a Recusal Order recusing all judges of the Second Judicial District Court from presiding over the citizen's Petition attached hereto and filed on or about December 20, 1993. The judges felt it appropriate to recuse themselves since the allegations not only may involve us but clearly involve one of our colleagues. If a Grand Jury was called we would be put in the position of presiding over such a Grand Jury in which it is clear that at least one of our colleagues is the primary target. As such we felt we had no alternative under the Code of Judicial Conduct than to recuse ourselves.

We would respectfully request that the Supreme County make a determination as to whether or not a Grand Jury should be convened due to the allegations contained in the Petition. We feel this is essential due to the breadth of the allegations which involve this entire district, the District

Attorney's office and the Department of Human Services. In addition, if the petition were to be granted it would seriously impact the continued independence of the judiciary/

We would also request that this district be allowed oral argument along with the petitioners and/or their representatives on this Petition. We have counsel prepared to proceed with oral argument on behalf of this district.

Finally, we would point out that this district has no funds to hire a Special Prosecutor. It is our understanding that if a Grand Jury is convened the District Attorney would be disqualified and the burden would fail on the Attorney General's office to assist the Grand Jury.

Thank you for directing your attention to this matter.

Very Truly Yours,

s/W. John Brennan
W. John Brennan, Chief Judge
Second Judicial District

WJB/rj

cc: Supreme Court Justices
District Court Judges
Patricia E. McKenna
Tom Ruiz

IN LIEU OF DOCKET SHEET

Documents contained in file GJ-93-00004 of the Second Judicial District Criminal Court. Deputy Clerk of the Criminal Court of the Second Judicial District, David W. Lepori, stated that no docket sheet exists specific to GJ-93-00004, that he has primary responsibility for maintaining all Grand Jury files in the district and further stated that all documents contained in this file are as follows:

[1]DEC 20 1993 - Petition for Grand Jury filed by Patricia E. McKenna with 33 sheets containing voter signatures.

[2]DEC 21 1993 - Letter from Thomas J. Ruiz, Clerk of the Court, to Judy Woodward, Bernalillo County Clerk requesting verification of signatures.

[3]DEC 27 1993 - Letter from Judy Woodward to Thomas Ruiz verifying that petition was supported by signatures of 264 registered voters of the county.

[4]DEC 27 1993 - Letter from Thomas Ruiz informing The Honorable Diane Dal Santo, Grand Jury Judge, Second Judicial District that the petition had been certified by the county clerk.

[5]JAN 3 1994 - Judge Dal Santo files Recusal.

[6]JAN 4 1994 - Chief Judge W. John Brennan files Recusal on behalf of ALL judges in the district.

[7]JAN 6 1994 - Clerk's Certificate (filed by David W. Lepori, Criminal Court) of the Recusal Order, listing counsel and parties to a non-jury matter with copy of petition for Grand Jury pursuant to assignment practice when all judges of a district court have recused.

[8]JAN 6 1994 - Letter from Chief Judge Brennan to Chief Justice of N. M. Supreme Court, Richard Ransom, notifying of the mass recusal; asking for oral argument whether the petition should be granted because of alleged impact on the continued independence of the judiciary.

[9]On or about FEB 3, 1994 - a copy of the Motion to Appear as Amicus Curiae filed in the Supreme Court by the Family Law Section of the State Bar.

APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

DISTRICT COURT OF THE
SECOND JUDICIAL DISTRICT,

Petitioner,
vs. No. 21881

PATRICIA E. MCKENNA,

Respondent.

(stamp)
Supreme Court of New Mexico
FILED
FEB -3 1994
s/Kathleen Jo Gibson

RESPONDENT'S FIRST AMENDED MOTION TO QUASH PETITION FOR WRIT OF SUPERINTENDING CONTROL AND FOR IMPOSITION OF SANCTIONS

Comes now the Respondent, Patricia E. McKenna, pro se, by special appearance and submits her motion to quash the above-titled action without hearing and to impose maximum sanctions against Petitioner as permitted by SCRA 1-011 or other Rule of the Supreme Court for knowingly filing an action the sole purpose of which is to delay the process of justice, and which petition, by its even suggesting that the relief requested might be granted by this Court, flagrantly and wantonly impugns the integrity of the New Mexico Supreme Court. Respondent asserts as

grounds for her motion that the petition is devoid of any merit whatsoever because there is no basis in law and no set of facts which would entitle Petitioner to the relief requested, that the request for relief is premature, and that the pleading is fatally defective for want of essential parties, for want of cause of action, and for want of subject matter jurisdiction for this Court to hear the matter or to grant the requested relief. In support of this motion Petitioner STATES:

Petitioner seeks two alternative remedies, either to have this Court act in the place of a district court judge to rule on the sufficiency of a citizens' petition for a Grand Jury investigation of Petitioner and other parties in interest including the Office of the Bernalillo County District Attorney and the Department of Human Services, or to make a rule by extraordinary writ which would invalidate the citizen's petition. Either alternative requires this Court to overturn existing case law interpreting a provision of the Constitution of the State of New Mexico.

WANT OF ESSENTIAL PARTIES

This Court's superintending control authority extends to the inferior courts of the state. N.M. Const. Art. VI, Sec. 3. The respondent is a private citizen and party in interest, not a judicial officer of an inferior court. Petitioner has made no allegation that a judicial officer of an inferior court has acted on behalf of Respondent in any manner subject to review by extraordinary writ. All judges composing Petitioner, the Second Judicial District Court, have recused. Recusals are not subject to review by this Court. The Petitioner brings no party before this Court to whom the requested Writ may issue. The petition is fatally defective for want of an essential party. This Court has held that failure to state a cause of action by virtue of an absence of standing to sue can be raised at any time. Valdez v. City of Las Vegas, 68 N.M. 304, 361 P.2d 613 (1961)

REQUEST FOR EXTRAORDINARY WRIT IS PREMATURE

As the petitioner states in Point 5, all of the judges in the Second Judicial District recused. The duty of this Court is to now appoint a judge, justice or judge pro tempore to hear all further proceedings. SCRA 5-105(B), SCRA 1-088(B). Petitioner has alleged injury and inadequacy of appeal enumerated in Point 2, but has offered nothing to show how the injury would occur if a judge were to rule on the sufficiency of the petition for a Grand Jury. Anticipation of a ruling, the execution of which might be damaging, is not ground for an extraordinary writ. State ex rel Oil Conservation Comm'n v. Brand, 65 N.M. 384, 338 P.2d 113 (1959). (Decided under former rule.)

WANT OF CAUSE

Petitioner advances four reasons in Point 6 as being ground for exercise of this Court's superintending authority (1) that great expense will be incurred by taxpayers and innocent targets; (2) that this Court might eventually or even probably will be required to rule on some related question at a later time; (3) continued pendency and uncertainty surrounding the citizens' petition affects independence of the judiciary; (4) granting writ creates opportunity to prevent damaging error in lower court. It is well-settled in case law that assertions such as Petitioner advances are not sufficient grounds for an extraordinary writ. State ex rel Oil Conservation Comm'n v. Brand, 65 N.M. 384, 338 P.2d 113 (1959). (Decided under former rule.) Respondent expands in succeeding paragraphs.

Petitioner's claims of irremediable harm are vague and are not supported by factual allegations. The petition alleges no additional harm or injustice that any private person would incur as a result of the particular wording of the citizens' petition that would not equally result from a more restrictively worded petition for a Grand Jury given that the scope, nature and subject matter of a grand jury's inquiry is not limited to a petitions' allegations. State ex

rel. Deschamps v. Kase, 114 N.M. 38, 834 P.2d 415 (1992). No real benefit would be achieved by restrictive wording unless the scope, nature and subject matter of inquiry were restricted as well.

Petitioner has alleged no unusual burden of expense to be borne by Petitioner as a result of this particular citizen's petition for a Grand Jury over and above what any other complex investigation would require, such as one by a citizens' petition which meets the requirements Petitioner advocates but targets the same entities with greater specificity. Because Petitioner is the target of the citizen's petition for a grand jury, Petitioner's assertion of possible waste of public resources is transparently self-serving. Even so, Petitioner claims no inordinate burden on public resources beyond what would be required for any grand jury investigation of public officials and agencies given that the Grand Jury's purview is not limited once it is empaneled. Petitioner presents no justiciable controversy with respect to any of its rights, there is no "actual controversy" nor uncertainty of duty of office to invoke the jurisdiction on questions of the constitutionality and construction of the Constitution of the state of New Mexico. Once again, the Petition falls short of the requirements for invoking an Extraordinary Writ. State ex rel Oil Conservation Comm'n v. Brand, 65 N.M. 384, 338 P.2d 113 (1959).

Consequences of the uncertainty asserted by Petitioner in Point 6 are not relieved by the delaying tactics of this petition for extraordinary writ, but are prolonged. The present pall which has been cast over the Second Judicial District by the petition for Grand Jury only can be dispelled by empaneling the Grand Jury. Petitioner offers no evidence to support the allegation of rising abuse of the citizens' petition system.

Petitioner and those who have indicated an interest to brief amicus curiae, The New Mexico Criminal Defense Lawyers' Association and The New Mexico District Attorneys' Association, have access to this Court's

rule-making authority. They have had opportunity to present their concerns at any time over the past sixty-eight years of the existence of **Article II, Section 14**, of the state constitution. They have had thirteen years since this section was last amended and eighteen months since Cook was handed down. **SCRA 23-106, Cook v. Smith ,114 N.M. 14, 834 P.2d 418 (1992).** If judicial rule-making were the proper means to address their concerns, they have not used it.

The result sought by Petitioner, though not obvious in the requested relief, is vested solely in the legislature who has the exclusive authority to initiate the process to amend this state's constitution. An amendment to Article II, Section 14 is proposed for the next general election. No expansion of judicial discretion to deny a petition for Grand Jury is proposed. Petitioner seeks to accomplish what the legislature has declined to do. Petitioner seeks to abridge an important existing constitutional right and by judicial act, thereby usurping the authority of the electorate.

"If we were to require that a grand jury petition must contain specific allegations of crime and offenses, then we would by judicial fiat severely limit the function of the grand jury system." Cook, supra.

While Petitioner argues that Oklahoma statutes require greater specificity, Petitioner conveniently fails to go far enough. **Statute 38 Okla.Stat. Sec. 102** provides that if the citizens' petition fails to state "a reasonably specific identification of areas to be inquired into and sufficient general allegations" it may be amended to do so. The New Mexico Constitution contains no such safeguard. Indeed, Senate Joint Resolution 5 to amend the state constitution contains no provision to increase the specificity requirement for the citizen petition for grand jury.

WANT OF SUBJECT MATTER JURISDICTION

In Point 6, Petitioner asserts "review by this Court" would be appropriate for setting guidelines. There is no action by

an inferior court to review. Also, the procedures for rule-making promulgated by this Court are not by writs of superintending control. SCRA 23-106.

Petitioner's assertion in Point 5. That this Court can confer upon itself original jurisdiction to certify the citizens' petition does not follow merely from the existence of rules created by this Court which set forth procedures whereby this Court assigns a judge to hear proceedings in an inferior court. N.M. Const. Art. VI, Sec. 2, Sec. 3, Sec. 13.

If Respondent were to agree to be party to a collusive agreement attempting to vest this Court with a jurisdiction that by law it cannot exercise, such an act would permit Petitioner to later claim that the entire Grand Jury process is void ab initio even though Petitioner was party to the agreement.

SUFFICIENCY OF CITIZENS' PETITION

That some identified signatories (Exhibit A) out of a total of 411 might be dissatisfied litigants in no way supports Petitioner's contention that the citizens' petition is "vexatious", i. e. "Without reasonable or probable cause or excuse."--Black's Law Dictionary, 6th Ed. Petitioner offers no authority for the notion that civil appeal is a remedy for victims of criminal acts by judicial officials, an inescapable premise of Point 6. Appeal is a civil remedy for a civil wrong. Criminal sanctions are a collective response to a limited set of acts proscribed by public will and agreement. The targeted entities have the power to conceal their actions from public scrutiny, as further shown by (Exhibit B.)

Petitioner offers no factual basis for the contention that 264 registered voters are not competent to decide whether an investigation should be conducted of the breadth specified in the petition for a Grand Jury.

WANT OF JURISDICTION TO GRANT REQUESTED RELIEF

This Court has construed Article II, Section 14 of the state

constitution such that the role of a district judge with respect to citizen's petitions for grand juries is ministerial once the minimal requirements for invoking the system are met. Petitioner asks this Court, under guise of "rule-making" or "guidance", to alter the construction of the state constitution to make the requirements more restrictive because Petitioner asserts the effects of the present construction are undesirable. But the wisdom and desirability of the effect of laws, especially those defined by the power of the people to determine how their governments shall be constituted, are not matters within judicial purview.

16.The courts cannot generally review or interfere with the acts of the legislature or executive departments as a special guardian of the constitution, and judicial power is to enforce the supremacy of the constitution only when legislative enactments or executive proceedings are plainly violative of the constitution, and then only upon suit by one directly and adversely affected thereby. While it is clear that this Court may, in unusual circumstance, grant standing to a private party in litigation of extraordinary writs, it is arguable whether this Court has the power to command a private citizen to be party thereto. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (S.Ct.1974). This would leave the case uncontested on the side of Petitioner.

17.New Mexico courts have no discretion to deny a constitutionally sufficient petition request for a grand jury. The citizens have reserved for themselves direct access to the criminal process.

18.The question of jurisdiction compels an answer. State v. Morris, 69 N.M. 89, 364 P.2d 348 (1961); State ex rel. Overton v. New Mexico Tax Com'n, 81 N.M. 28, 31, 462 P.2d 613 (1969).

JUSTIFICATION FOR SANCTIONS

Petitioner in Points 7 and 8 raises issues with respect to specific content requirements of a citizens' petition and

expanding the discretion of a judge certifying a citizens' petition to refuse to grant the request. But these issues were settled in recent case law wherein they were decided counter to Petitioner's proposed "guidelines". Cook v. Smith, supra. Petitioner references this case throughout the petition. In that decision this Court found the limits its ruling placed on judicial discretion are mandated by the intent of the framers of the state constitution. Petitioner does not assert that this Court erred in its construction of Article II, Section 14, but implores this Court to construe it to achieve a different result. Petitioner asks this Court to abuse its rule-making authority; to alter the state constitution as Petitioner desires, giving it an interpretation this Court already has ruled was not the framers' intent. Petitioner slanders this Court by implying that such action might be carried out.

Petitioner has alleged the citizens' petition to be vexatious, but has offered no basis for that assertion other than prejudicial characterization of the signers in Points 6 and 7 accompanied by Petitioner's (Exhibit D) which is of no probative value. Moreover, Petitioner's own authority states that a citizens' petition is without foundation only if it requests investigation of matters that are exclusively outside the geographical area or that are totally noncriminal in nature. Because the grand jury inquiry is not confined to the allegations of the petition, "vexatious" and limitations issues are questions for the grand jury, not the certifying judge.

As a matter of interstitial interpretation, however, we think it clear that the judge must make a legal, nondiscretionary determination that the inquiry proposed by the petition is valid....

We cannot determine as a matter of law that the petition for grand jury is a witch hunt based upon speculation or conjecture by the circulators and signers of the petition, nor can we carte blanche impugn their motive. This is the function of the grand jury. Cook, supra.

Even if the total regulatory scheme suggested as a prototype by Petitioner were adopted, Respondent can reasonably be presumed capable of amending the citizens' petition to remedy any shortcomings found and specified by the certifying judge. **38 Okla. Stat. 1991, Sec. 102.** Petitioner cites this authority as source in Point 8. Petitioner's own authority shows that the only certain gain Petitioner achieves by this Petition for Writ of Superintending Control is delay.

Petitioner already has used official authority and reputation to engage in acts of harassment, intimidation, and libel targeted at signers of the citizens' petition for a Grand Jury and those persons whose cases Petitioner speculates might be part of a grand jury inquiry. **(Exhibit C & D)** It is in the environment created by Petitioner that would force Respondent to start a new petition.

Petitioner is composed of nineteen district court judges, with an aggregate of more than two hundred years of bar experience. Petitioner is represented by competent and experienced counsel of highly rated ability. Yet Petitioner's assertions of legal foundation are in direct opposition to the authority Petitioner cites, without contending that the authority decided the issues in error. Since Respondent, an ordinary citizen, is cognizant of the binding precedents, Respondent contends these facts are subjective evidence that Petitioner and counsel knowingly filed a fraudulent action, the only purpose of which is to delay the process of justice.

CONCLUSION

This Court has a ministerial duty to perform pursuant to its promulgated rules, SCRA 12-504 and SCRA 1-088(B), which have the force of law. While the choice of judge, justice or judge pro tempore is discretionary, that one of the three shall be appointed is not subject to judicial discretion. The chief judge of the Second Judicial District notified this Court by letter dated January 6, 1994, that all judges of the

district had recused. Three offices of state government named in the petition have custody of public records that are essential to a Grand Jury's investigation. Targets of the citizens' petition already have made efforts to determine which cases might be presented to the Grand Jury as evidence of criminal acts or malfeasance in office. Continued delay causes increasing risk to the efficacy of a Grand Jury investigation. It is difficult to see how public confidence in the integrity of the state judicial system can be maintained when major targets of a citizens' petition for Grand Jury are allowed to frustrate the purpose of the state constitution by prosecuting this suit in the state's highest court.

RELIEF SOUGHT

Whereas this Petition for Writ is frivolous, serving as nothing more than a delay of the process of justice and a vehicle for introducing prejudicial material to this Court which might later be called upon to rule on matters yet to be examined in a court of original jurisdiction, Respondent asks that the Petition for Writ of Superintending Control be quashed without hearing, and that Petitioner be sanctioned to the fullest extent permissible.

Respectfully Submitted,

s/Patricia E. McKenna

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5603 Guadalupe Trail NW
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EXHIBIT LIST

Exhibit A: Kass' affidavit listing litigants.
Exhibit B: Kass' letter to Bill re: status conference tapes.
Exhibit C: The Albuquerque Journal article, Jan 11, 1994.
Exhibit D: The Albuquerque Journal article, Jan 12, 1994.

APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT,

Petitioner,
vs.No. 21881
PATRICIA E. MCKENNA,

Respondent

WRITTEN TRANSCRIPT OF ORAL HEARING
RE: NMSC #21,881
FEBRUARY 9, 1994

J = Justices speaking
D = Charles Daniels speaking
M = Patricia McKenna speaking

J: ...The first two which are, uh, the McKenna District Court matter and the second one, uh, Mr. Lichtenberg. Counsel have asked for a total of 40 minutes in the first case; 35 in the second. If that full time is taken that would be an hour and 15 minutes, if I'm not mistaken, which will take us to about 20 after the hour of ten. The third case which is the Albuquerque Police Department versus The Honorable Joanne Burge, Number 21,861 certainly won't come on for hearing before 10:20 and likely not until 10:30. Those of you who are interested only in that case and although you are welcome to remain in the Court, if you may wish to leave at this time, you may do so until 10:20. Keep an eye on the Court though I don't think we are likely to come back before that hour. As I say, it may well be 10:30. Those of you who are interested only in that case if you wish to leave, you are excused at this time.

The first two cases will be heard without any recess and we'll begin now with the District Court of the Second Judicial District versus Patricia McKenna, Number 21,881, and, Mr. Daniels, I believe, you've asked for 12 minutes opening reserving 8 minutes.

D: Yes, Your Honor.

J: You may proceed.

D: If it please the Court, this case once again presents to the Court issues relating to the constitutional right of citizens to petition for a grand jury. This Court fairly recently visited issues concerning the citizens grand jury in Cook versus Smith and State ex rel Deschamps versus Kase and as Court can see from the pleadings that have been filed in this Court there has been a good deal of activity relating to these kinds of petitions and there are some issues that are once again presented to this court for review.

It all comes down to judicial interpretation and application of Article II, Section 14, of the constitution, which like many constitutional provisions, is starkly simple. It doesn't provide a lot of information about the details of the right, the limitations on the right and it doesn't provide a lot of details about judicial interpretation and application of the process. Provided simply that a grand jury should be ordered to convene upon the filing of a petition therefore signed by not less than the lesser of 200 registered voters or five percent of the registered voters of the county. And as with other simple and summary constitutional provisions, it requires judicial interpretation. This case calls for some more judicial interpretation or a reaffirmation of what we think are the principles that were broadly discussed by this Court in Cook versus Smith. This case should be decided in favor of these petitioners by this Court's decision by Cook versus Smith.

In Cook, this Court interpreted Article II, Section 14

to contain several fundamental propositions. One of them is that there is a right of the citizenry to conduct, uh, to have a grand jury convene for a lawful grand jury investigation within the jurisdiction of a criminal grand jury upon the filing of a petition that invokes that jurisdiction containing a minimum of 200 signatures. There is that right and the Court discussed the reasons why there may be need for citizen access for a legitimate grand jury investigation within the jurisdiction of the criminal grand jury in question. But Cook also pointed out there is no right to launch that juggernaut for improper reasons. There is no right to convene a grand jury to go on a fishing expedition beyond the lawful jurisdiction of the grand jury, to ask it to investigate matters that are not within its power to investigate and to use it for vexatious and oppressive reasons. It serves no legitimate purpose of the citizens' petition to allow the grand jury to be used for that process. The third provision that this Court, I think, outlined clearly in Cook versus Smith is that the judiciary has a clear role both in interpreting what Article II Section 4(sic) intends to accomplish in applying its procedures to make sure those legitimate purposes are carried out and the illegitimate purposes are not carried out.

This Court in superintending control over all the courts of the state has a role in setting out guidelines and the lower courts have a role in examining petitions granting those that are legitimate and denying those that would seek to use the processes of the grand jury for illegitimate means. And this case really brings those principles in Cook versus Smith to bear once again. The petition, in this case, is jurisdictionally invalid on its face by any fair reading.

It states - comes now Patricia E. McKenna and hereby submits the petition of over 200 voters of Bernalillo County to empanel a grand jury with a special prosecutor to investigate and, if appropriate, to indict Second Judicial District Judge Anne M. Kass and any other judge and, or, officer of the court, those persons in the office of the District Attorney, the Department of Human Services and

any person or other public or private agency that have engaged in acts of misconduct or abuses of authority resulting in the perpetuation of child abuse, extortion, violations of civil rights and other wrongdoing or violations of law.

If this kind of petition were sufficient to invoke the extraordinary processes of the grand jury to be launched in a criminal investigation without any showing of any suspected true criminal conduct, then there is no protection against the misuse of the grand juries. The second part of Smith versus Cook's opinion would be written out. It would say that all you have to do is basically file a statement that you want to engage in a broad fishing expedition, use a few words that may arguably be construed to relate to crime although without any information would flesh it out whether that's what's being looked at and then the court would be powerless.

J: Mr. Daniels, are you arguing for a different rule on the exercise of discretion by the trial judge before whom a matter like this may come in this case?

D: I don't think it is a different rule at all, Your Honor. I think it is a fundamental application of the principles of Cook versus Smith and a fundamental application of the Court's continuing power to inquire into jurisdiction. This Court in Cook versus Smith says that the petition process cannot be launched on a jurisdictionally inadequate inquiry and that the District Court has a role in making sure that takes place, and, I think, this is just a specific application of that. The Court always needs to look at the jurisdictional facts when jurisdiction is raised. It may be apparent from the face of the petition that this is jurisdictionally invalid. In this case, I think it's fairly clear. They're attacking the institutions here rather than any particular criminal offense. In fact, it would be very difficult for a district judge to instruct a grand jury on what their duties are in this petition because the petitioners don't take over the grand jury. It's not handed over to...to a...a vigilante process. The District Court still has to supervise the grand

jury process and the district attorney or other prosecuting attorney that acts as an aid to the grand jury and the district judge has to tell the grand jury what they're to do. What guidance is there for the grand jury as to what they're supposed to be looking into in this kind of petition? And I think that doesn't call for any greater exercise than this Court outlined in general terms in Cook versus Smith. In this case, the petition is invalid on its face. I don't think it invokes the jurisdiction of the court by setting out any particular legitimate inquiry. All the inferences from this petition are to the contrary that it is not an inquiry into crime but into the processes of the courts and the actions of judges and district attorneys as judges and district attorneys rather than some allegation of taking bribes or beating a child or something like that. It simply doesn't appear here.

J: One thing that troubles me, Mr. Daniels, is that we have lots of requests that have been filed here about setting out guidelines for the district courts but we have very few suggestions as to what those guidelines should be. Now, in Cook versus Smith, there was a fairly explicit disclaimer of the idea that a specific offense need not be alleged. Uh, so what I'm asking you - what short of - is if Cook versus Smith to be reaffirmed and not departed from, what kind of specificity, what kind of allegation do you think should be made with respect to the occurrence of criminal conduct or other subject, uh, that invokes the jurisdiction of the grand jury and what not?

D: I think that language in Cook versus Smith has been misinterpreted. If it were to be correctly interpreted as saying that it can't look into what is really meant then I think that Cook versus Smith ought to be re-examined. I don't think that's necessary. I think it's too expansive and too indulgent a reading of Cook versus Smith, Your Honor, that some have read into it. Uh, the petition need not be in legalistic form. It need not state probable cause. We're not asking for a probable cause inquiry. It need not state any necessity. The court need not look into that. But it ought to be enough to satisfy the court before convening a grand

jury, that this is truly an inquiry within the criminal jurisdiction of the grand jury.

J: Well, again, are you suggesting that there ought to be an allegation, uh, somewhat analogous to, uh, in the civil process of that we established a motion to dismiss for failure to state a claim or in the criminal context, a motion to dismiss for want of an allegation of, uh, of a crime? Are you suggesting that there ought to be allegations of a specific criminal, uh, specific to a crime?

D: There ought to be enough, Your Honor, without requiring detail of precise allegations where the court is satisfied that the inquiry is for investigation of criminal conduct and on Page 7 of our...of our Reply Brief that we filed, I set out a number of factors that allege criminal conduct as proscribed by New Mexico law within the geographical scope of inquiry of that district's grand jury within the applicable limitation periods and in which the grand jury has the jurisdiction to investigate. And I think the Court ought to look at it in a common sense way and not...and not deny it simply because there's some technical flaw in that but look at it to see if it satisfies the Court that this is a matter within its jurisdiction. The attachment of Exhibit K contains about two sentences that I think adequately sets out the requests for investigating a crime, uh, as the result of an automobile accident occurring in Dona (sic) County on such and such a date. It's...it's...uh, it could be that simple.

Uh, on the other hand, if someone came in and filed for a grand jury of Bernalillo County be convened to investigate the man who killed Charles Lindbergh's son, well, it's a killing on the face of the petition, but surely the court can't be denied the common sense of saying, wait a minute, I don't know if this is within our jurisdiction here. Let's look into this a little bit and that gets us to the second problem of the court's necessary jurisdictional inquiry. The jurisdictional facts may need to be looked into. If the court is not clear on whether this matter is within its jurisdiction or not. The court can look into the facts.

And I think this Court did it in Cook versus Smith itself. By saying that with this TVI investigation, petitioner...wait, but we know what that's about - that's public knowledge. It doesn't need to be alleged that the acts took place in Bernalillo County because it's clear, uh, here that it did or it doesn't need to allege that it's within the statute of limitations. This is something that's fairly clear.

J: Let me ask you one other question, then I'll leave you alone, Mr. Daniels.

D: I love the questions, Your Honor.

J: Are you arguing for a different rule with regard to the amount of discretion that, uh, Cook says the trial court has in these kind of cases?

D: If I'm reading Cook versus Smith correctly, Your Honor, I don't think it needs to be a greater amount of discretion. If I'm incorrect in that, and Cook versus Smith is read to deny the district court the obligation or opportunity to look into whether jurisdiction really exists - to look into what they're really asking to be investigated - then, uh, then it would have to be expanded because, in this case, for example, if there were allegations in here that Judge Kass committed child abuse on John Doe on such and such a date, something that may appear to invoke investigation of a crime. Given the surrounding circumstances, I think the Court ought to be able to look into whether they're alleging that she committed child abuse by giving the child to the other parent's custody and thereby put the child in an unsafe environment - an act committed as a judicial officer, or whether they're alleging she took the child out and beat it or committed some kind of criminal conduct. And I think the court had ...if...if...if the inquiry into jurisdiction of the court is discretionary, then, of course, the court has to have the discretion to determine those jurisdictional facts. I think, uh, the example set forth in Exhibit A...

J: You are now using your rebuttal time.

D: I realize that, Your Honor, I just wanted to finish answering the question...uh, the example in Exhibit A is

a...is a great example of that proposition and uh, I don't know if the Court has had opportunity to look at that yet, but there is a petition of signatures and the first sheet of Exhibit A asks for an investigation on whether so and so committed parental kidnapping. That alone...if that alone were sufficient to invoke a grand jury, uh, it would require ignoring what really is being sought there because, unfortunately for that petitioner, that petitioner set forth a detailed statement that was submitted along with that facially brief petition saying that the Army over in Germany and Domestic Relations Court up in Pennsylvania gave custody of her child to her ex-husband and therefore she wants an investigation. It had nothing to do with the jurisdiction of a New Mexico grand jury. I'll reserve the rest of my time for rebuttal. Thank you.

J: Mr. Daniels, let me ask you a question. Assume that this Court basically accepts your position with regard to this issue and a district judge presumably conducted a hearing and found the petition was invalid. On review, what is the standard of review? Is that an abuse of discretion standard or would the - this Court review it de novo?

D: I think the Court would review it in the same way the Court reviews other matters of jurisdiction. Where a hearing's been held in determining jurisdiction. I see this as no different from any other jurisdictional inquiry, Your Honor.

J: In other words, where, uh, the...the weighing of the evidence or credibility of the source of proof is at issue, we would perhaps defer to the trial court.

D: I think so, Your Honor, in line with the constitutional interests of all. And it need not be a complicated sort of inquiry. It doesn't look into whether there's probable cause and it doesn't look into the truth of the allegations. It looks into what it's asking to be investigated. What is the goal? Not whether they're going to reach that goal, but what is the allegation they're asking to be investigated. Does that fall within the grand jury's

investigation? And that serves every legitimate purpose of the citizens' petition and keeps it from serving illegitimate purposes. Thank you.

J: Ms. McKenna. Have you appeared before this Court before, Ms. McKenna?

M: No.

J: I don't suppose you...you're absolutely and completely at ease but we would like you to be as much at ease as you possibly can and if indeed you feel overpowered at any time as a citizen pro se, call time out and we'll get re-oriented. Do you understand about the lights, Ms. McKenna?

M: Yes, those were explained to me.

J: Do you have any other questions before we begin?

M: Well, I...I have a question, uh, that I want to raise about jurisdiction.

J: Yes, well you may address those. I just meant that procedurally, do you have any questions of us?

M: No, and I appreciate the kind words.

J: Then you may proceed.

M: Okay. Um, I wanted to address two preliminary issues before I get any further. One of them is the question of jurisdiction and, uh, secondly I wondered about the court's determination on the Motion to Quash.

J: Yes. We have not addressed that question. It...we're taking that under advisement until we have heard the oral argument today.

M: Okay.

J: If you wish to devote part of your 20 minutes in support of your Motion to Quash this petition on some grounds other than the merits, you're welcome to spend some on that if you wish because we have not specifically ruled on it.

M: Okay. Uh, first, I'm an ordinary citizen. I'm unschooled in the law and, uh, but petitioner has made me party Respondent. In filing the Petition for the Grand Jury I was a messenger, uh, of citizens, of the people that had signed that petition. I'm the one that walked it down to

the courthouse. Um, incidentally, that message has come to the attention of this Court before. In 1988, the Court chartered the Palantis Commission and, uh, citizens have observed that there is not a single recommendation of the resulting report that has been followed. Nor any related recommendation by this Court's Chief Justice. Uh...

Okay. So petitioner has placed me here (excuse me), uh, and the petitioner argues that it is important for me to present to this court a true adversary proceeding that will sharpen and define the issues and present conflict before competing constitutional interests. My understanding as an axiom of law that in such competing there must be some reasonable adversarial balance to satisfy due process. I submit uh, there's no contest between myself, a sole citizen, and what seems to be a confederation of the totality of the state's lawyers as well as lawyers' special interest groups.

Petitioner's argument asserts that the jurisdiction is based on an inquiry into reality, whatever that means rather than face of pleading. It is my understanding that the courts - all courts - obtain jurisdiction solely by statutory authority. To my knowledge within the last five decades, this Court has never issued a Writ of Superintending Control against a private citizen. Petitioner suggests that the Supreme Court may set to determine the validity of the citizens' petition for a grand jury.

Perhaps, this court may ministerially appoint one of its members to do that. However, while the Court...this Court has original jurisdiction over writ proceedings, the Constitution, Article 6, Section 13, vests all other original jurisdiction in the state's district courts.

The real parties in interest in layman's terms, the interested parties, are the 411 signers of the citizens' petition and, indeed, there are many others. A fair reading of the petition for writ reveals that the true intent of the petitioner and its supporters, is to alter the constitution. If this court compels me to do so, I'll defend the Constitution to the best of my ability.

I apologize that I have not had, uh, I cannot fairly answer, uh, petitioner's response to my amended Motion to Quash. The response is a disguised re-write of the petition of writ and it is so dramatically different in law and fact, and I have not had time having received it only yesterday afternoon. (cough) Petitioner alleges there are mixed allegations in its Petition for Writ of Superintending Control. Petitioner's loyal supporters are replete with assertions that the citizens' petition is for the purpose to harass and was done by disgruntled litigants. (cough) Petitioner further urges this court to dismiss the citizens' petition on the basis of immunity claims. (cough) The ABA Journal, February 1994, Page 28...

J: May Ms. McKenna have water?

M: Is there any water under here? Okay...The ABA Journal, February 1994, Page 28, reveals the multi-count indictment of the Pennsylvania Supreme Court Justice Rolf Larson. The Grand Jury inquired into the inner workings of the court system. Nothing is more common where judges are accused of crimes. (cough)

The ABA Journal, February, 1989, The "Fall from Grace of a Greylord Judge" reports that Judge Rosen was unperturbed by allegations of criminal conduct relying on his claim that, and I quote, "they were the simple ravings of disgruntled losers." Respondent believes that some 16 judges were subsequently convicted and imprisoned...so much for immunity. Apparently, Petitioner similarly relies on the claims of disgruntled losers, as what lawyers refer to as a complete defense.

Petitioner alleges bad faith. The Petitioner has made many erroneous assumptions in the Petition of the Writ of Superintending Control. They've alleged as fact that the citizens petition was filed in bad faith and for purposes other than it was intended to be used. That is, vexatious, retaliatory and involves an ulterior motive. Petitioner's allegations of fact are specifically and categorically denied and Respondent demands strict proof. I feel compelled to comment on claims of so-called special

interest groups of citizens. If such claims seek to discredit the citizens petition by simple labeling, history shows that of necessity, citizens must join together to combat corruption in government. If there are special interest groups, it is the amicus curiae lawyer groups who have great financial interest in the outcome of this case.

J: Ms. McKenna, can you tell me in your own words what you feel the crimes alleged are in the petition against, uh, uh, the judge who is named and all other judges that are brought into the petition? What...what specifically is the crime that the petitioners in your own words are claiming to have investigated?

M: Uh, there are more than one. I can tell you with no reservations whatsoever that the first one is record tampering.

J: Record tampering.

M: Yes.

J: Anything else?

M: Uh, yes, sir, there are. Mr. Daniels said that the issue is quite simple. It's not simple at all.

J: You said in one of your pleadings that if we were to adopt the guidelines that Kansas has adopted, basically, all we would be doing is asking you to amend your petition - to be more specific. Perhaps, in response to Justice Franchini's question of you may...you could pursue what specificity you would include in such an amendment to the petition.

M: It's a...we did suggest that, and I think it was an Oklahoma statute that petitioner raised and, uh, petitioner quoted in the Petition for Writ, Article 101. Oh, no, it was Article...it was Section 101. Section 102 said what the...you know, what's offered to the citizens to amend.

Yes, if we did, we would have to broaden the wording and the reason why is, because Mr. Daniels' claim it's very simple to put, uh, this kind of language on a petition and we had great difficulty choosing wording for the petition and I did not put the wording on that petition. The reason is because one - there may be two, uh, or three

crimes involved in one case - involving judge, one or two attorneys, maybe a guardian ad litem, maybe a psychologist. In other words, there are multiple people involved in one case in multiple crimes. How...we did not know as lay people ...how to put that on the petition. So we named one judge who is very prominent, uh, and puts herself forth to the public, and we put one specific crime down there to try and establish that we knew what we were talking about.

J: This crime is child abuse?

M: The specific crime was extortion. I believe that is the only one on the petition that has a, um, a restricted legal definition.

J: Well, child abuse is the second.

M: Yes, but we were talking about perpetuation of which is, uh, something that we wanted a grand jury to look at. We've been collecting documents of cases for over 2 years. We are not empty handed and would not be empty handed and the people we have spoken with would not be empty handed were they to be given the opportunity to testify.

J: In response to Justice Franchini, uh, and from what you've just said, uh, you believe that in furtherance of an act of extortion there was tampering with records? That's the...that's an example?

M: Two different crimes, I believe. Extortion is separate from record tampering.

J: Okay. So, uh, record tampering is a specific crime that was not included and not just simply a part of the conduct constituting either child abuse and extortion.

M: It is a specific crime. It is probably the most pervasive one and it doesn't apply to just one individual within the court system.

J: Can you give one other example besides, uh, the record tampering that you would believe you would produce evidence to show probable cause to prosecute.

M: Well, we do have, uh,...we do have that I can recall a couple of cases that do involve extortion not necessarily

with the same judge. So we had a terrible time trying to come up with the wording. Uh, the alternative is to take one case or one courtroom at a time.

J: Did you have any legal advice at all in drafting of your petition or the formulating of your plans and procedures?

M: Uh, there was about 4 or 5 of us that tried to put it together. Uh, I did not consult any attorneys. If any of the other ones did it was on an informal basis, certainly.

J: Because the questions that Mr. Daniels raises go to the responsibility of the convening judge to determine the legal sufficiency of the petition, as you refer to it, the jurisdiction or validity and those can be technical questions that would require some legal expertise and perhaps one of your more significant problems is that you're addressing a technical problem which we talked about in the Cook case namely the legal sufficiency of the petition aside from simply the number of signatures.

M: Uh, Respondent has learned a great deal since July. If I were to sit...if we were to sit down now to write that petition, I'm sure that just with our own knowledge what we've learned that the wording would...would be greatly improved.

J: Well, please proceed.

M: I'm...I'm finished. Can I ...any time I have left over, may I save for "surrebuttal?"

J: No. We don't grant surrebuttal. I will be asking you at the conclusion of the remarks made by Mr. Daniels, whether indeed you feel you need any additional time for briefing. You said that you received one pleading yesterday and did not have time to fully analyze it. So you might give some thought as to whether you might need another 10 days or so to, uh, file briefs.

M: I definitely do. I received four amicus curiae briefs yesterday along with Mr. Daniels' pleading.

J: And perhaps the legal questions of validity and sufficiency, not discretionary, not where the courts could go either way, but where the law requires the court to

dismiss because of lack of jurisdiction or legal insufficiency. Now that has not been addressed by you in your briefs.

I believe my colleagues on the court as well as myself would be disposed to give you time to address those in a brief since this last flood of pleadings came at the 11th hour. Do you think 10 days would be sufficient time?

M: Yes.

J: Very well, then, absent some other matter being brought to my attention, you can assume that you may have 10 days from today to file such additional briefs.

M: Thank you.

D: I would like to compliment Ms. McKenna on a very good argument. I think she's much too modest about her legal abilities and knowledge. I think that on the legal issues that she's raised in her brief and in her argument here, she's done as well as many lawyers this Court sees.

It's only when we get to the underlying facts about what this grand jury investigation is about that the argument is unsound and the interpretation of how the principles of Cook and Article II, Section 14, apply to those facts. I think the court saw from its attempt to find what was the true thrust of the citizens' petition that Ms. McKenna presented to the Court uh, that what appears on the face of the petition that we think appears clearly on the face of the petition as to what the purpose of this petition is, the kind of inquiry they're asking to invoke is what is also behind it. She was not able to articulate any identifiable criminal conduct whether in her...whether in any kind of legalistic terms as was used during the argument or even any lay terms. In fact, what came back to was what we think is clear from the face of the petition. She said this matter has been raised with this court before in the 1988 Palantis inquiry into administrative matters in the Domestic Relations court. I think her other comments made it clear that that's what they're talking about here and not any matter of true criminal conduct. In fact, when she was asked about certain allegations a new one was

raised, record tampering. It appears nowhere on the face of the petition.

Okay. And when there was a question about any kind of specificity she suggested that it would have been difficult to put that forth in the face of petition. It doesn't require lawyer language but just some kind of allegation that...that any person could make about some kind of conduct you could reasonably construe to be criminal.

J: Now we're getting back to the question I asked you before.

D: Yes, your Honor.

J: And that question is, how much specificity should be required? In several of the briefs here, I recall rhetorical language like what needs to be specified is answers to questions like who, what, when, where and why. That sounds like a...a request for specificity in alleging a criminal violation.

D: Your Honor...

J: ...and then I recall in Mr. Twohig's brief, I think, that he set out a criteria such as there needs to be a colorable claim of violation of criminal conduct. Now I am groping, as you can tell, Mr. Daniels, for some, uh, definition from you and the amici as to exactly what kind of guideline, what kind of criterion you advocate this court to adopt either a modification of or an advocation of Cook v. Smith.

D: Certainly, Your Honor, and I don't think it requires any rigid application of any...any magic criteria. It's like any other inquiry into jurisdiction. Either from the face of the petition or looking at the jurisdictional facts, the court should take into consideration a number of factors. We mention a number on Page 7 of our brief that I've mentioned to the court before. Uh, and as I said before, I don't think there's any...any magic formula that has to be met on the face of the petition. These are factors the court should look to in trying to decide whether this is a true criminal investigation or it's a...it's an action to complain about judicial rulings that were unsuccessful in appeal or

not appeal or in some other fashion - or I'm not talking just about the judiciary as targets as to any citizen whose attempted to be a targeted by the grand jury for something that may not be legitimate criminal inquiry. The court should take those factors into account in deciding jurisdiction. It is not a mechanical formula. It requires no magic language. In fact, the magic language approach is what might get the courts into trouble saying we'll test this if this has a word that indicates a crime, therefore, we've got to convene the grand jury to do it, or if it doesn't have the word we don't. I think that's not the approach to take. And we...we've set forth a number of other considerations in our brief, Your Honor, that talk about the kind of inquiry the court should make. There are some examples of the district judges of this state have employed in a number of these petitions. I see my time is up. May I finish answering the question?

J: Yes.

D: And in those cases, they, uh, they have looked to see what is meant by certain language in the petition. Instead of just denying it because it doesn't have a particular word or so on, they've looked into what it is...is really sought to be investigated, In one case, the drug scandals in Quay County turned out to be some people writing sentencing letters to a judge. And the courts said if that's what you're asking us to look into that's beyond the grand jury's jurisdiction. And that's what we're asking for - a common sense approach taking all these factors into consideration with the underlying purposes of the grand jury and the grand jury petition.

J: Mr. Daniels, if you wish, you may have 5 days following the filing of any further briefs by Ms. McKenna, in which to reply. Now, if you wait just a moment - very well - thank you very much for your help today, Mr. Daniels and Ms. McKenna. I likewise would echo the remarks of Mr. Daniels, your presentation today was very helpful to us, it was well prepared and you are to be congratulated not having had the opportunity to have a

legal education and to practice law, you've done quite well. Now as you understand, we will have to take this under advisement because of the need for the additional briefing. We are not going to issue any kind of an alternative writ in as much as the matter will be presented to us under appropriate briefs within a reasonable period of time. And then you will hear from us by written opinion or decision. Thank you very much.

You are all up now if you wish to be excused to leave the courtroom before we proceed with the second case.

District Court of the
Second Judicial District,

Petitioner

PATRICIA E. MCKENNA,NO. 21881
Respondant

as transcribed by Patricia E. McKenna and tape as provided for provided for review by notary.

I hereby swear and attest this to be a true copy of the noted hearing.

s/Patricia E. McKenna
Patricia E. McKenna

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANDOVAL)
Subscribed and sworn to before me this 10th day of June, 1994.
My commission expires: 11/30/96
(notary seal) s/Sandra Kay Rice
Notary

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

DISTRICT COURT OF THE
SECOND JUDICIAL DISTRICT,
Petitioner,
vs.No. 21881
PATRICIA E. MCKENNA,
Respondent.

RESPONDENT'S BRIEF ON "VALIDITY AND SUFFICIENCY" OF THE CITIZENS' PETITION FOR GRAND JURY, GJ-93-OOOO4 AND ON STANDARDS FOR DETERMINING VALIDITY AND SUFFICIENCY OF CITIZENS' PETITIONS FOR GRAND JURY

Comes now the Respondent, Patricia E. McKenna, pro se, pursuant to the Supreme Court's order of February 9, 1994, granting leave to brief on the validity and sufficiency of the citizens' petition for a grand jury, GJ-93-00004 and on proposed changes in standards for judicial determination of sufficiency and validity of citizens' petitions for grand jury. Respondent states:

FACTUAL CONTEXT

The F.L.S. Newsletter, Vol.2, No.3., published by the Family Law Section, State Bar of New Mexico, reports how the Family Law Section obtained permission of Board of Bar Commissioners to draft and lobby for the 1986 replacement of Joint Custody statute. Two new paragraphs added to the **Domestic Relations Code, 40-4-9.1(C)(3) N.M.S.A. 1978 and 40-4-9.1(D)(2) N.M.S.A. 1978**, gave the Domestic Relations Court authority to substitute its judgment for that of parents in custody and parenting issues.
Bernalillo County has one-fourth of the state's population,

one-third of the state's judges and one-half of its lawyers practicing family law. **Exhibit 1** [Journal advertisement]
In August, 1990, the Second Judicial District began unlawful destruction of public records of Domestic Relations proceedings. This process continues at the present time. Audio tapes of proceedings routinely are withheld without lawful authority. **Exhibit 2** [Retention Schedule], **Exhibit 3** [Affidavit on destruction of tapes], **Exhibit 4** [Kass' letter to Bill]

ALLEGATIONS OF FACT TO SUPPORT INVOKING GRAND JURY INVESTIGATION

These allegations are offered not as proof of any fact, but only to demonstrate that the Respondent and the circulators and signers of petition GJ-93-00004 have good cause to believe that a grand jury should be empaneled to investigate as requested.
Parties in domestic relations litigation do not have right to court-appointed counsel, strict standards of proof, protection from speculative search, requirement that there be articulated goals to support intervention, statutory limitations on character and duration of dispositions or mandated periodic review that the Children's Code provides.
The state's monopoly on dispute resolution with respect to divorce and custody of children creates an opportunity to take over lives of both parents and children by means of an irrebuttable presumption of unfitness of parents because they once were married and now are divorced or divorcing. The difference between Children's Code and Joint Custody statutes provides motivation for the district attorney and Department of Human Services (D.H.S.) to return abused children to abusive situations if parents are estranged and litigating over custody. The children can be silenced by intimidation aided by D.H.S. and acquiescence of guardians ad litem. An abusive parent has no reason to complain as most want custody to spite the former spouse;

the district attorney doesn't need to investigate or prosecute; and D.H.S. doesn't show any increase in load per caseworker. The district courts, either in domestic relations proceedings or actions under the Children's Code, cooperate by depriving the protective parent both of legal custody and contact with the child.

This accomplishes four objectives. It prevents the protective parent from acting on behalf of the child in another forum; it insures unending custody litigation; it deprives the protective parent of knowledge of the child's status; and it destroys the child's faith in the system and in the parent's ability to protect the child.

Substantive right of statutory immunity in Children's Code for persons reporting suspected child abuse is not recognized in Domestic Relations Court. There, the reporting person is subjected to presumption of bad faith and malicious purpose. If a child's statements are the source on which the report is based, the child is available to the accused parent for days or weeks before being officially interviewed, usually in the home of the accused parent. Unremarkably, the child often recants and the reporting parent is blamed for forcing the child to make the statements.

Guardians ad litem allow improper evidence to be admitted from participating evaluators that directly impugns the child's credibility. Evaluation results are made available to D.H.S. as well. Also, guardians ad litem most often do not make appearance in appellate proceedings initiated by protective parents.

The attorneys and psychologists make money and the judge builds a political machine based on loyalty bought with the confiscation and disbursement of litigants' assets. The parent so deprived of fundamental liberty and fundamental rights is tagged a "dissatisfied litigant." The scheme is for the systematic asset-stripping by those holding government power.

LEGAL ARGUMENT

POINT LEGAL FRAMEWORK OF DOMESTIC RELATIONS COURT AND ITS RELATIONSHIP TO CHILDREN'S COURT PROVIDES FERTILE GROUND AND MOTIVATION FOR BROAD CONSPIRACY INVOLVING ABUSE OF JUDICIAL AUTHORITY, PROSECUTORIAL MISCONDUCT, DERELICTION OF DUTY BY DEPARTMENT OF HUMAN SERVICES, CHURNING OF CASES BY ATTORNEYS AND PSYCHOLOGISTS.

The 1986 amended Joint Custody statute is unconstitutional on its face, violating the Equal Protection, Procedural Due Process and Substantive Due Process provisions of the 14th Amendment to the U. S. Constitution because of the nature of the rights subject to infringement and because of due process afforded to parents in substantially similar circumstances under the Children's Code.

The cited sections of the Domestic Relations Code on custody orders and parenting plans allow the state to litigate through the judge against the fundamental liberty of parents in relationship to their children. The Domestic Relations Court can achieve the same outcome as though parents were respondents adjudicated to be abusive or neglectful in Children's Court, but without the due process protection afforded by the Children's Code statutes. 32-1-27(J) N.M.S.A. 1978 (1989 Repl.), compare to 32A-2-14(B) N.M.S.A. 1978 (1993 Repl.).

POINT ALLEGATIONS OF CRIMINAL OFFENSES RESPONDENT COULD HAVE INCLUDED IN PETITION FOR GRAND JURY REGARDING WIDESPREAD CORRUPTION IN BERNALILLO COUNTY

Crimes involving public records
Audio tapes of proceedings
Withheld
As "judges notes" or "recordings"

Just never submitted
Altered--incriminating segments redacted
Destroyed outright
Files
Documents altered
Sealed attachments destroyed when files microfilmed
Facilitating felonies
Psychological abuse
Sexual abuse
Physical abuse
Retaliation and threats of retribution against those who complain
Crimes obstructing justice--acting and facilitating
Intimidating witnesses and victims
Corrupting physical evidence
3.Manipulation of the judicial process to inflate fees andd costs and to prevent appeals
Perjury
Falsifying D.H.S. investigators' reports
Threats by D.H.S. personnel
Conspiracy
To deprive parents and children of equal protection of laws to facilitate racketeering
Collusion of counsel against appeal
Suppression of abuse investigation
To deprive appellants challenging unlawful court practices effect of right of appeal
Withholding court records and transcripts
Denying counsel in Children's Court
Fraudulent use of calendar system
Stripping out issues challenging practices of lower courts
Repeated fraudulent calendaring to defeat appellants by financial attrition or procedural misstep
To deny equal access to process of court
Denying access to community funds to retain counsel
Not setting hearings by removing documents from files or denying receipt of mandates
4.Creation of an aura of fear to prevent complaints

5.The conducting of sham trials, civil and criminal, done to conceal judicial corruption
Racketeering
Extortion of parties, attorneys and persons not before court to obtain money or suppress complaint
Fraudulent use of process of court to convert litigant assets for benefit of conspirators

Conduct meriting grand jury investigation from one case:
Breach of Judicial Conduct Standards with criminal intent
Obstructing appeal by destroying or hiding records
Using judicial position to have recordings destroyed
Using judicial position to remove documents from file
Failure to carry out duties (filing audio tapes)
Malfeasance
Using judicial authority to obtain case in which his impartiality could be questioned
Continuing case after conflict of interest was exposed
Using power of judicial position to protect himself from accountability for unlawful acts
Unlawful acts
Facilitating child abuse
Facilitating intimidation of a witness
Tampering with public records (recordings and documents)
Tampering with evidence
Conspiracy to deprive parent and child of civil rights
Deprivation of civil rights under color of law
Conspiracy to injure children for exercising civil right to report abuse
Blackmail by guardians ad litem or attorneys

How should those who would petition for a grand jury investigation word their petition under the standards proposed by Petitioner? What would be the effect on public confidence in the judicial system if this data were circulated for the time necessary to obtain the signatures required? What might targets of the petition do to obstruct justice before the grand jury could be empaneled?

POINT THE CITIZENS PETITION IS VALID AND SUFFICIENT BECAUSE IT HAS BEEN CERTIFIED BY THE COUNTY CLERK TO HAVE MORE THAN TWO HUNDRED SIGNATURES OF REGISTERED VOTERS OF THE COUNTY

Petitioner's arguments to justify setting more restrictive standards for wording of citizens' petitions were, in the main, drawn from a description of Pennsylvania's grand jury system found in points 8, 9 and 12 through 14 of Petition of McNair, 187 A. 498 at 504 (Pa. 1936). Notably, Petitioner does not cite that case, although it is cited as authority in the brief of amici N. M. Trial Lawyers Association and N. M. Defense Lawyers Association.

But Petitioner fails to note the factual context in which McNair was handed down, that a judge on his own initiative had charged a grand jury to investigate a magistrate, admittedly as a "fishing expedition". Petition of McNair, supra., 505.

Moreover, at the time this decision was handed down, the Pennsylvania grand jury system was a modification of the common law grand jury. There was neither constitutional nor statutory definition or regulation of its scope and powers until 1978. See Investigating Grand Juries, 42 Pa.C.S.A. 4541. The Supreme Court of Pennsylvania stated in its 1936 decision:

In some states the power of investigation is virtually unlimited, and the grand jury, of its own motion, may originate and conduct them. But in Pennsylvania the freedom of the grand jury is very much restricted. Our courts, mindful of the danger that this body might, if unrestrained and unguided, encroach upon the very liberties which it was created to protect, have imposed definite limitations upon its investigatorial powers. An investigation by a grand jury directed by the court involves all the powers and incidents necessary to a complete inquiry into the subject-matter in charge....

When a court orders an investigation, it acts under its official responsibility and must answer for the step taken when it is not justified in the exercise of sound judicial discretion but is the result of an arbitrary capricious exercise of power. [citations omitted, emphasis added] Petition of McNair, supra. at 503.

The court of quarter sessions has no power to set such an inquiry in motion unless it has reasonable cause to believe that an investigation will disclose some criminal misconduct which is within its jurisdiction to punish. Petition of McNair, supra. at 505.

As Mr. Justice Montgomery observed in his questioning of counsel for Petitioner during oral arguments, Petitioner and amici have asked for "guidance" from this Court on setting standards for validity and sufficiency of citizens' petitions, but have offered little in the way of substantive suggestions. Respondent would point out that all opposing briefs have one theme in common, that this Court adopt whatever rule is necessary to make the instant citizens' petition fail, even if this Court must revise Cook to accomplish that goal.

In one of the citations omitted from Respondent's quotes from McNair, that decision referred the reader to Blair v. United States, 250 U.S. 273 (1919). This decision by the United States Supreme Court sheds much light on the historic function of the grand jury:

It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the crime, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. Hendricks v. United States, 223 U.S. 178, 184, 32 Sup. Ct. 313, 56 L. Ed. 394.

[8] And, for the same reasons, witnesses are not entitled to

take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation. In truth it is in the ordinary case no concern of the one summoned as a witness whether the offense is within the jurisdiction of the court or not. At least, the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction. [emphasis added] Blair v. United States, supra. at 282. Nor are such questions any more compelling when raised by targets of a grand jury's investigation. Hendricks v. United States, 223 U.S. 178.

POINT JURISDICTION OF GRAND JURY IS SEPARATE AND DISTINCT FROM JURISDICTION OF COURT, AND ONLY THE GRAND JURY HAS CONSTITUTIONAL AUTHORITY TO DECIDE ISSUES REGARDING ITS JURISDICTION

Petitioner's claim that a grand jury's jurisdiction can be challenged as that of a court is not consistent with the historical purpose of grand juries in American jurisprudence since the functions of trial or fact-finding were eliminated in common law practice before we obtained our independence from Great Britain. Grand Juries, 38 C.J.S. 90 et seq. Scope of investigation of a grand jury is an entirely different concept from jurisdiction of a court. Petitioner's citations do not mention "jurisdiction" of a grand jury in such light. Respondent's authority cited in her answer to the Petition for Writ, Blair v. United States, 250 U.S. 273, 282 (1919), does use the word "jurisdiction" with respect to grand juries, but states that it is the grand jury which has the power to decide questions of its jurisdiction.

POINT CITIZENS' PETITION GJ-93-00004 MEETS MORE RESTRICTIVE REQUIREMENTS UPON WHICH PETITIONER'S ARGUMENTS ARE BASED

Not only is much of the text of Petitioner's pleadings excerpted from Petition of McNair, but the stricter standards proposed are also those of the "very much restricted" Pennsylvania grand jury system. Nonetheless, Respondent argues that this citizens' petition meets even the strict requirements set out by the Pennsylvania Supreme Court.

A grand jury investigation, because of the gravity of the undertaking, must have a definite purpose to discover criminal acts which seriously affect or injure the public generally, which effect, if permitted to continue, would endanger public safety, health, demoralize the personal security of members of the public, or permit systematic criminal depredations by public officers. Such matters require immediate attention so that these evils may be suppressed. The criminal acts subject to investigation must be such that the ordinary process of the law is inadequate to cope with or discover them. [citations omitted, emphasis added] Petition of McNair, supra. [7] at 504.

Petitioner's own authorities offer the most compelling arguments against the remedy sought in this action.

In Cook v. Smith, supra., at 46, this Court found that the judiciary does not have constitutional authority to refrain from empaneling a grand jury when a requesting citizens' petition is not totally without form or content. Petitioner asks that a more technical standard be applied to citizens' petitions.

Petitioner claims that Cook v. Smith, supra. "recognized that the courts of this State are implicitly vested with supervisory power over grand jury practice." Reality is that this Court saw only "a residuum of supervisory authority over the convening of a grand jury," Cook v. Smith, supra., at 45, and that is founded not on clear precedent but upon "interstitial interpretation." Cook v. Smith, supra., at 45. But Respondent argues that the explicit wording of the authorities quoted in the Cook decision forecloses interstitial interpretation allowing even

a residuum of authority on the part of the district court not to empanel a petition-initiated grand jury.

When so initiated, it is plain that the judge is without the power or discretion to decline or refuse to make the order, but must do so if the petition meets the requirement of said section, as the one here admittedly does....

The framers of the Constitution did not intend to leave it to any one, or group of officers or officials to determine finally or at all times, whether other officers would do their duty or whether a grand jury was needed. In accord with our people's historic fear of too much power or tyranny in government (as evidenced by the Bill of Rights and many provisions of both the U.S. and Oklahoma Constitutions) these men deliberately left that prerogative to be exercised by the people in the manner provided. [emphasis added] [State ex rel. Ogden v. Hunt, 286 P.2d 1088, 1093 (Okla. 1955)]. Cook v. Smith, supra.

Petitioner implies that an investigation would be vexatious based on speculation and conjecture if the citizens' petition did not contain elements of fact to establish that a crime had been committed. However Cook, supra., at 45 says that a grand jury may not indulge in such practices, but goes on at Page 46 to state that the determination of the purpose of the circulators and signatories is a question for the grand jury, not for the judge. If the petitioner for a grand jury can supply only speculative accusations to the grand jury once that body is empaneled, it is the duty of the grand jury to halt its proceedings with appropriate findings. This is the function of the grand jury in protection of the accused.

But if evidence is sufficient to suggest to the grand jury that a crime may have been committed, the grand jury can begin its search for further evidence to establish probable cause. Neither the content of the citizens' petition nor the substance of first evidence presented to a grand jury need be sufficient to establish probable cause. Such a requirement casts the petitioner for the grand jury in the role of a district attorney, confines the grand jury's inquiry

to searching for the identity of a probable perpetrator and limits its findings to ratifying the petition's allegations. Respondent asserts that this is precisely the intention of Petitioner's argument; to make the content of the citizens' petition the charge to the grand jury as a special inquiry. Those who hide behind Petitioner, who for reasons of self-interest conspired to bring this action, do not want grand juries to have the power to look into patterns of criminal activity by judicial officers. What they seek to achieve is to prevent inquiry into any facts that are not already in the hands of petitioners for grand jury and are not revealed in the petition. This scheme would abolish the inquisitional function of the grand jury. It would make public officials who, by the nature of their offices, are capable of keeping public records from public scrutiny, effectively unaccountable by grand jury process for concealable criminal offenses.

POINT PETITIONER SEEKS BY JUDICIAL RULE TO USURP CONSTITUTIONAL AUTHORITY VESTED IN ANOTHER ARM OF THE JUDICIARY.

As the last cited sentence of Blair v. United States, **supra**. clearly states, jurisdiction of the court and jurisdiction of the grand jury are two distinct quantities. Each entity has the authority to make its own determination on the facts whether it has jurisdiction. Petitioner's authority states that an investigating grand jury is "an arm of the criminal court." Petition of McNair, **supra. at 503**. But the foundation for petition-initiated grand juries in New Mexico does not rest upon the Judicial Article of our state constitution, it is rooted in the Bill of Rights. Although the grand jury is empaneled by the process of other juries to assure independence and fairness, the authority of the grand jury to decide its jurisdiction is independent of judicial power. It is only the exercise of the grand jury's jurisdiction that is subject to judicial authority, and then only for procedural issues of constitutional

dimension such as the privilege against self-incrimination or unreasonable search and seizure. Blair v. United States, supra. at 281.

Petitioner asks this Court to adopt a rule that will take questions of jurisdiction of the grand jury out of the hands of the grand jury and vest that decision in the judge. Petitioner asserts irreparable harm will be done to the judicial function if grand juries are empaneled to investigate official conduct on the basis of "vague and sweeping allegations" to engage in "odious and oppressive" "fishing expeditions". But:

Because of the method by which its deliberations are conducted and the secrecy surrounding them, it is a particularly suitable body to investigate misconduct of public officials and public evils. Petition of McNair, supra. [6] at 503.

What Petitioner seeks in reality is a per se rule based on a presumption that an official arm of the court will not properly carry out its duties according to its charge; i.e., that a grand jury will conduct a vexatious investigation if it is handed a citizens' petition does not set out allegations meeting some nebulous criteria. Once again, an authority cited by Petitioner's amicus [New Mexico District Attorneys Association] speaks out against the granting of the remedy sought on that basis.

There are several reasons for rejecting a per se rule. First, if a district attorney has issued directives to isolate a member of the staff from the prosecution of a particular case, one should not presume that secret violations of the directives will occur. A prosecutor's sole duty is to do justice.... [T]he sort of misconduct one must presume to justify a per se rule is that prosecutors would violate a clear mandate....The possibility of such despicable behavior is too slight to justify a per se rule. State v. Pennington, 115 N.M. 372, 376, 851 P.2d 494, 498 (Ct. App. 1993).

This principle applies with equal force to the grand jury's discretion in determining when its investigation is not likely to lead to discovery of criminal conduct or the

identity of perpetrators or questions of its "jurisdiction". That the alleged public offenses or malfeasance be proscribed by New Mexico law was explicitly stated in Cook, supra. at 45. But this Court's conclusion was based on the former wording of the charge to the grand jury. The new wording of 31-6-9 N.M.S.A. 1978 is consistent with federal case law holding that state criminal courts have cognizance of violations of federal criminal statutes. Palmore v. United States, 411 U.S. 387, 407 (1973).

Any concerns about vexatious "fishing expeditions" can be addressed by a general charge to grand juries that they should not conduct them. Petitioner overlooks this simple solution because Petitioner desires to abolish all but special grand jury inquiries.

POINT PROPOSED CHANGE WOULD, BY JUDICIAL FIAT, SEVERELY LIMIT THE FUNCTION OF THE PETITION-INITIATED GRAND JURY SYSTEM.

Petitioner's exhibits of recent citizens' petitions purported to show "increasing abuse of such grand jury petitions" instead demonstrate the opposite. If the filing number of the instant petition and those in Petitioner's exhibits follow standard conventions, fewer than five citizens' petitions per year have been docketed in Bernalillo County in the past two years. Petitioner seems to classify any petition that does not meet its propounded standard as abusive of the process.

A closer look at three of Petitioner's exhibits paints a much different picture. The petition in Exhibit A was denied for want of proper number of qualifying signatures. But Petitioner states that petition would have been denied in any case because it sought investigation of events outside the county. But an inquiry by grand jury might have uncovered additional facts to show that the activities in Germany and Pennsylvania amounted to the perpetration of criminal acts in Bernalillo County violating the custodial

interference statute, 30-4-4 N.M.S.A. 1978.

In Petitioner's Exhibits B and E, the petitions each were certified to have the proper number of signatures, but the petitions were quashed by the Second Judicial District Court on motion of the Bernalillo County District Attorney on ground that the probable perpetrator in each case was a minor, and therefore not subject to criminal prosecution, but only under a delinquency petition filed in Children's Court at the discretion of the district attorney. The district court found that inability to prosecute the probable perpetrator deprived the grand jury of jurisdiction to investigate.

But that conclusion is not according to law. The Children's Code provides for mandatory transfer of any case from a criminal court to the Children's Court when it comes to the court's attention that the matter is within the exclusive jurisdiction of the Children's Court, i.e, the accused was a minor at the time the crime in question was committed. 32-1-11 N.M.S.A. 1978 (1992 Supp.) (former statute). Besides, conviction of a crime is an essential prerequisite to being adjudged delinquent. Doe v. State, 88 N.M. 347, cert. denied, 88 N.M. 318 (1975).

What can be stated as fact is that the Bernalillo County District Attorney and the Second Judicial District Court have acted to prevent empaneling petition-initiated grand juries in the county. Those powerful investigative bodies have power to examine any matter within their knowledge. Such as alleged corruption among district court judges and district attorneys.

Of course, the district judge, who presides over a criminal division, and the district attorney merely may be ignorant of the laws of the state. But that is not a very credible assumption. In addition to his responsibility as Children's Court Attorney for delinquency proceedings, at the time the motion was filed to quash the petition in Exhibit B, the Bernalillo County District Attorney was preparing to lobby before the New Mexico Legislature for adoption of House Bill 473, the proposed Children's Code revision. He had

worked with the subcommittee on Delinquency and Violent Offenders to develop the second article of the proposed Code revision, which includes the new transfer provision.

The Bernalillo County District Attorney has gone to great lengths attempting to insure his control of a grand jury if one is empaneled pursuant to the instant petition. While he could have and should have joined the action at bar as an interested party, he instead sought to perform the function of a party through recognition as an amicus curiae. The brief of the New Mexico District Attorneys Association raises a constitutional question not raised by Petitioner and not briefed by Respondent.

Petitioner refuses to acknowledge the wording of Cook, supra. at 46, which says, "If we were to require that a grand jury petition must contain specific allegations of crime and offenses, then we would by judicial fiat severely limit the function of the grand jury system." In light of this unambiguous wording, combined with Petitioner's "fourth" assertion on page 12 of the Petition for Writ of Superintending Control, there can be no doubt that Petitioner seeks by judicial fiat to severely limit the function of the grand jury system.

CONCLUSION

The petition for grand jury, GJ-93-00004, is valid and sufficient because it has been certified by the county clerk to have the number of signatures of registered voters in Bernalillo County to meet the requirement of Article II, Section 13 of the New Mexico Constitution. Any question of jurisdiction of the grand jury is a matter for the grand jury to decide. The district court has no authority to decide whether a grand jury should be empaneled based on the wording, substance, or content of the petition or any speculation as to the motives of the signers or circulators. To the extent that Cook V. Smith, 114 N.M. 41 extends authority to a district judge to make any determination as

to the jurisdiction of the grand jury, **Cook V. Smith** should be overturned.
Even if the authority vested in a judge by **Cook v. Smith** were applied to GJ-93-00004, this citizens' petition meets the standard for invoking secret, immediate investigation of extraordinary evils alleged against public officials set out in the authority from which Petitioner took its arguments.
This Court should appoint a justice to empanel a grand jury and to assist the grand jury in its investigation.

Respectfully Submitted,

s/Patricia E. McKenna
PATRICIA E. MCKENNA, Pro Se
5603 Guadalupe Trail NW
Albuquerque New Mexico 87107
(505) 345-5118

APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

June 2, 1994

No. 21,881

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT,
Petitioner,
vs.

PATRICIA E. MCKENNA,
Respondent.

STATEMENT OF REASONS WHY THIS CASE WAS NOT DECIDED WITHIN THE TIME LIMITS OF SCRA 1986, 12-406

(To be filed if case has not been decided within 10 months of filing notice of appeal, or within 3 months of submission.)

The above-referenced case has not been decided within three (3) months of the date of submission to the Court for the following reason(s):

For the purpose of a written opinion, this case has been consolidated with cases numbered 21,842, Pino vs. Rich, and 22,032, Valdez vs. Martin. The written opinion is in progress.

WITNESS, The Hon. Seth D. Montgomery,
Chief Justice of the Supreme Court of the
State of New Mexico, and the seal of said
Court this 2nd day of June, 1994.

(SEAL)s/Kathleen Jo Gibson
Kathleen Jo Gibson, Chief
Clerk of the Supreme Court of
New Mexico

(stamp)
ATTEST: A TRUE COPY

s/Kathleen Jo Gibson
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
(stamp)
Supreme Court of New Mexico
FILED
OCT -3 1994
s/Kathleen Jo Gibson

DISTRICT COURT OF THE
SECOND JUDICIAL DISTRICT,
Petitioner,
vs.No. 21881

PATRICIA E. MCKENNA,
Respondent.

THIRD MEMORANDUM FOR THE RECORD

The above referenced case was consolidated with cases numbered 21,842 and 22,032, notification of which was received by Respondent on June 4, 1994, a copy of which is attached.
Through some clerical error, notice of consolidation was never filed in the Court record, which Respondent wants to call to the Court's attention and thereby mend the error.

Respectfully Submitted,

s/Patricia E. McKenna
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APPENDIX D

IN THE UNITED STATES OF AMERICA

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

DISTRICT COURT OF THE
SECOND JUDICIAL DISTRICT,
Petitioner,

vs. No. 21881

PATRICIA E. MCKENNA,
Respondent.

RESPONDENT'S MOTION FOR SUPPLEMENTAL AND ALTERNATIVE FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now the Respondent, Patricia E. McKenna, pro se, to request Supplemental and Alternative Findings of Fact and Conclusions of Law to the September 21, 1994, Opinion of this Court in the above titled action. Respondent makes this request pursuant to SCRA 1-052 (B) of the Rules of Civil Procedure and SCRA 5-606 of the Rules of Criminal Procedure, whichever is applicable.

SPECIFIC REQUESTED FINDINGS OF FACT

[1] Two hundred, sixty-three of the two hundred, sixty-four petitioners were not served with notice of the Petition for Writ of Superintending Control.

[2] Authority of the citizens of the State of New Mexico to determine by written constitution how they shall be governed is a political right reserved to them by the Ninth Amendment of the Constitution of the United States.

[3] By Article II, Section 14, of the New Mexico Constitution, the people of the State of New Mexico delegated their political power to vest any two hundred registered voters of a county, or five per cent of a county's registered voters, whichever is less, with the political authority to invoke an investigating grand jury in the common law tradition as understood at the time the State

Constitution was framed.

[4] Once vested, being a right to petition for redress of grievances, the right to invoke a grand jury by petition is secured by the Right to Petition Clause of the First Amendment of the Constitution of the United States.

[5] The judiciary does not have constitutional authority to countermand political acts of the people unless the acts are contrary to the Constitution or laws of the United States.

[6] Determination whether a statute, constitutional provision, or other political act is wise in light of its effect on other aspects of government is a political question, not a justiciable controversy.

[7] A petition-initiated grand jury is an independent constitutional body of inquiry that is not subject to prior restraint on the exercise of its discretionary authority by any other government entity.

[8] The powers and duties of the investigating grand jury may be exercised at its discretion, except for the abuse thereof rising to the level of a violation of a citizen's constitutionally protected rights, without being subject to the superintending authority of any other constitutional officer.

[9] The function of a district court to empanel a grand jury pursuant to a citizens' petition is ministerial, though acts of judicial discretion may be required in the process of jury selection.

[10] Appointing a judge, justice, or judge pro tempore after all judges of a district court have recused in the matter is an administrative duty of the chief justice of the State Supreme Court.

[11] Neither a district judge nor a district attorney has authority to prevent a grand jury or to limit its scope.

[12] The grand jury has sole authority to determine the scope of its investigative jurisdiction.

[13] The grand jury has sole authority to determine the propriety of its investigation.

[14] Subject only to those limitations arising because of conflict and constitutional rights of persons, the grand jury has sole authority to determine what it may see and consider in the performance of its duty.

[15] It is the duty of the grand jury to call and examine witnesses and compel the production of documents or other things, then to determine probable cause that indictable offenses were committed and the identity of possible perpetrators.

[16] Violations of federal criminal statutes are offenses against the people of the State of New Mexico.

[17] The petition GJ-93-00004 was certified by the Bernalillo County Clerk to contain signatures of 264 registered voters within the county.

[18] The petition filed by McKenna did not seek investigation into activities outside the geographic scope of Bernalillo County grand jury inquiry.

[19] The petition did not seek inquiry exclusively into matters that were not public offenses or did not constitute malfeasance in office.

[20] The petition filed by McKenna did not seek inquiry exclusively into matters on which the statute of limitation had run.

[21] The standard for determining validity and sufficiency of a citizens' petition for grand jury set forth in Cook v. Smith stated that petition was valid if it was not "clearly erroneous"; i.e., did not seek inquiry exclusively into matters that were outside the scope of a grand jury's inquiry.

[22] Article II, Section 14 of the Constitution of the State of New Mexico is self-executing and examination of a petition for grand jury by a district court judge is not necessary to carry the constitutional provision into effect.

[23] District Court of the Second Judicial District is subordinate to the New Mexico Supreme Court.

[24] All judges of the Second Judicial District Court recused from presiding over the grand jury inquiry initiated under the petition filed by McKenna.

[25] McKenna did not request a hearing on the sufficiency of evidence supporting allegations of criminal acts set forth in the petition for grand jury or in the pleadings and briefs.

[26] McKenna was not given notice of an evidentiary hearing.

[27] No ruling requiring that a petitioner for grand jury present evidence of the criminal acts or malfeasance alleged to a judge prior to empaneling the grand jury was in effect at the time the petition for grand jury was filed by McKenna or at the time McKenna appeared before the Supreme Court or at the time of filing of any pleadings or briefs in the case at bar.

[28] Neither superintending control authority nor any other judicial power conveys upon any court jurisdiction to decide political questions.

[29] The invocation of a grand jury by petition of registered voters is an exercise of voter franchise and a legitimate exercise of political rights.

[30] In response to a request by the Court for further allegations of criminal activity, Respondent alleged, inter alia, the intentional, unlawful destruction of public records and provided incontrovertible evidence to the Court that audio tape recordings of proceedings in more than 1,800 domestic relations cases were destroyed at a time when the record retention schedule for the district courts, adopted as a regulation of the State Records Commission, required that such records be retained permanently.

GENERAL REQUESTED FINDINGS OF FACT

[1] What is the title and caption of the case in litigation in the lower court over which the Supreme Court took control by its Writ of Superintending Control?

[2] What is the nature of the controversy between the parties in the case in the lower court over which the Supreme Court took control by its Writ of Superintending Control?

[3] What conflict of rights existed between the Petitioner for Writ, the District Court of the Second Judicial District and the Respondent, Patricia E. McKenna, that formed a justiciable controversy prior to the filing of the Petition for Writ?

[4] Who was the resident judge in the case?

[5] Is the nature of the proceeding civil or criminal?

REQUESTED CONCLUSIONS OF LAW

[1] The Second Judicial District Court's Petition for Writ of Superintending Control does not bring the essential parties before the Court. This Court lacks personam jurisdiction to adjudicate the substantive rights of two hundred, sixty-three signatories to the Petition for Grand Jury.

[2] This Court lacks subject matter jurisdiction because exercise of the Supreme Court's superintending control authority does not bring before this Court a justiciable controversy because the Writ Petition would misapply judicial discretion to override as unwise a particular exercise of special voting franchise, that political authority delegated by Article II, Section 14, of the Constitution of the State of New Mexico, under the powers reserved to the People by the Ninth Amendment of the Constitution of the United States, to the two hundred, sixty-four registered voters who signed Grand Jury Petition GJ-93- 00004, and guaranteed to them by the right to petition clause of the First Amendment to the Constitution of the United States.

[3] The petition filed by McKenna met the requirements set out in Article II, Section 14 of the Constitution of the State of New Mexico for invoking a grand jury investigation.

[4] The petition filed by McKenna met the requirements for validity and sufficiency in force at the time the petition was filed.

[5] Article III, Section 1 of the Constitution of

the State of New Mexico prohibits applying to the petition filed by McKenna any standard for validity and sufficiency of grand jury petitions promulgated after said petition for grand jury was filed.

[6] The right to invoke a grand jury by citizens' petition is a fundamental right and any infringement thereon is subject to strict scrutiny.

[7] The possibility that a grand jury might disregard a charge not to engage in vexatious investigation based on speculation or conjecture or a fishing expedition is not a compelling and overriding consideration such as would warrant the adoption of a per se rule depriving the grand jury of the traditional sole authority under common law to determine its investigative jurisdiction.

[8] The cost of presenting a citizens' petition to a grand jury does not constitute a compelling and overriding consideration such as warrants taking the determination of validity of the requested inquiry out of the hands of the grand jury.

[9] A citizens' petition for grand jury is not a pleading. It does not initiate litigation in a case or a controversy and is not restrained by the technical, procedural and evidentiary rules governing the conduct of criminal trials or civil procedures.

[10] Use of judicial rule-making authority to create a cause of action that permits judicial challenge to the sufficiency of a petition for grand jury, or the evidence to support it, and the associated interminable delays for adjudication and appeal of those issues prior to empaneling an investigating grand jury, constitutes an unconstitutional infringement on the right of the people to the full effect of the role of investigating grand jury in the suppression of public evils and systematic criminal depredations by public officials.

[11] The use of interstitial interpretation in defining a "residuum of supervisory authority" that subjects a self-executing constitutional provision to judicial discretion is a violation of the separation of powers under

Article IV, Section 34 of the Constitution of the State of New Mexico and the popular sovereignty and right of self-government reserved to the people in Article II, Sections 2 and 3 of the Constitution of the State of New Mexico.

[12] Article VI, Section 3 of the Constitution of the State of New Mexico is unconstitutional as construed and applied to give the judiciary discretionary authority over the exercise of non-justiciable political power reserved to the people by the Ninth Amendment of the Constitution of the United States and guaranteed as a fundamental right by the First Amendment of the Constitution of the United States.

[13] Provision of NMSA 31-6-9 permitting a district judge to direct the grand jury as to any special inquiry into violations of law that he wishes them to make does not abridge the scope of the grand jury's investigation but allows a single grand jury to address judicially spawned inquiries and petition initiated inquiries as both are authorized under Article II, Section 14 of the Constitution of the State of New Mexico.

[14] The Second Judicial District Court lacked standing to challenge the validity of the petition for grand jury filed by McKenna.

[15] Under the standard of a legal non-discretionary determination that a petition is valid if it does not seek investigation of matters wholly outside the grand jury's scope of investigation, the petition filed by McKenna is valid and sufficient.

[16] As a matter of law, a grand jury must be empaneled pursuant to the petition filed by McKenna.

WHEREFORE, Respondent respectfully requests that the Court file Findings of Fact and Conclusions of Law and amend its Opinion, Judgments, Decisions and Orders to be consistent with said Findings of Fact and Conclusions of Law.

Respectfully Submitted, (signature)

PATRICIA E. MCKENNA, Pro Se